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No. 00-947

IN THE
Supreme Court of the United States

J. L. WILSON,

Petitioner,

v.

JAMES NEAL, DIRECTOR OF THE ARKANSAS SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

BRIEF IN OPPOSITION

LYNN WILLIAMS
STAFF LITIGATION ATTORNEY
ARKANSAS SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT
Justice Building - Room 110
625 Marshall Street
Little Rock, AR 72201
(501) 376-0313

ROBERT J. DONOVAN
Counsel of Record
DAGGETT, VAN DOVER, DONOVAN & PERRY, PLLC
P.O. Box 646
12 South Poplar Street
Marianna, AR 72360
(870) 295-3434

Attorneys for Respondent

164788
Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. Are the constitutional rights of the petitioner (and all similarly situated citizen attorneys) to enjoy the federally guaranteed protections of due process and the equal protection of the laws being denied, when the Arkansas Supreme Court or the lower state's courts (in an attorney disciplinary proceeding) are allowed by the system adopted by the state court to exercise unfettered and unlimited discretion in fashioning a sanction of "suspension" of the attorney's license to practice law (in a disbarment proceeding), when the period of such sanction of "suspension" exceeds the limitation of the period of years that the Arkansas Supreme Court's published Procedures for Regulating the Professional Conduct of Attorneys at Law imposes upon the power and authority the Arkansas Supreme Court's Committee on Professional Conduct to impose such sanction, when the court is disciplining such attorneys?

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STATEMENT OF THE CASE

The petition and argument includes a lengthy, unnecessary and sometimes inaccurate review of the history of this disciplinary action which requires a response to the facts alleged.

1. Criminal Proceedings:

The facts leading to the within proceeding are found in *United States v. Wilson*, 806 F.2d 171 (8th Cir. 1986) as follows:

> Defendant practices law and operates a farm in Helena, Arkansas. Between February 1980 and April 1982 he borrowed approximately $775,230.00 from the FmHA for farm operating expenses with the loans primarily secured by an FmHA lien on his crops. To insure compliance with the security agreement entered into at the time of the loans, the FmHA circulated defendant's name on a list of FmHA borrowers to the grain dryers in the region of his farm. The grain dryers would then properly issue checks to defendant and the FmHA as co-payees as payment for crops transported from the farm.
>
> Between 1981 and December 1982, defendant made multiple sales of grain in the names of Willie Weaver and Reggie Wilson. Willie Weaver, defendant's cousin and co-defendant below, worked as a farm manager for defendant. Reggie Wilson is defendant's son and is a student, not engaged in farming. The government presented

> evidence that the proceeds from the sales made by Weaver and the junior Wilson, which were issued clear of the FmHA lien, went variously into defendant's law firm account, to cash, into his farm expense account, or toward payment on a bill for farm supplies.
>
> In May 1981, the FmHA required that a supervised joint bank account be established in the names of the FmHA and defendant and his wife, Henrietta. FmHA loan proceeds were to be deposited into the joint account, and defendant was required to advise the FmHA of his intended use of funds prior to the time of any withdrawal. On various occasions, defendant would apply to the FmHA to have funds transferred from the joint account to his farm operating account from which he would retransfer the money to his law firm account. A substantial portion of funds was used for the purchase and maintenance of a Mercedes Benz.

The court in its opinion further stated:

> Defendant-appellant Jimmie L. Wilson appeals from a final judgment entered in district court upon a jury verdict finding him guilty of one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, of forty counts of knowingly disposing of property mortgaged to a government agency, in violation of 18 U.S.C. § 658 and of seven counts of unlawfully converting to his own use money of the United States, in violation of 18 U.S.C. § 641.

The above conviction was initially affirmed by the Eighth Circuit Court of Appeals but was reversed in a subsequent appeal when the Eighth Circuit found a *Batson* violation and vacated its previous affirmance. While awaiting re-trial a plea bargain was reached between the petitioner and the United States and the petitioner pled guilty to five (5) misdemeanor counts under 18 U.S.C. § 558 and 18 U.S.C. § 641. The misdemeanor counts were not modified as asserted by the petitioner.

2. Disciplinary Proceeding. While serving his sentence petitioner was notified by certified mail that a complaint had been filed with the committee pursuant to the Model Rules of Professional Conduct as amended and the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, a copy of which was enclosed with the letter. The letter further states that the complaint "is predicated on your entry of a plea of guilty to certain criminal offenses." Copies of appropriate documents concerning the underlying proceedings were attached to the letter. The letter called petitioner's attention to Section 5 of the court's procedures and notified the petitioner that he had twenty (20) days to respond "in affidavit form." Petitioner was further notified that the affidavit, along with the complaint and any supporting documents, would be sent to the committee for vote by written ballot. On April 19, 1991, the Committee, acting through its executive director, acknowledged receipt of an attorney's letter of representation dated April 15, 1991 from petitioner's attorney, requesting an extension of time until August 30, 1991. The director responded by stating the request exceeded the director's authority but an extension of time for submission of petitioner's affidavit of response was granted until May 20, 1991. The director sent a second letter to petitioner's attorney

dated June 10, 1991, acknowledging a subsequent request for extension of time received on May 20, the date the first extension was to expire. The director further advised that the committee chairman had been contacted and that the request for additional time was denied. Petitioner's attorney was advised that the complaint was being processed for a determination pursuant to procedures outlined in the letter. In a letter dated July 22, 1991, the petitioner was notified of the committee's decision to institute disbarment proceedings "resulting from your entry of a plea of guilty to certain criminal offenses." By letter dated July 24, 1991, petitioner's attorney notified the committee that petitioner disagreed with the decision and refused to voluntarily surrender his license. This disciplinary action was commenced on October 9, 1991, by the filing of a complaint against the petitioner in the Circuit Court of Phillips County, Arkansas.

A. First Circuit Court Ruling. In the first Circuit Court ruling the trial court concluded that the Committee chose to wait too long to bring its action and granted the defendant's motion to dismiss. In reversing the trial court the Arkansas Supreme Court stated that the operative procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys "focused upon the fact of conviction rather than the allegation of misconduct." The court then calculated the time from petitioner's plea of guilty on March 22, 1990, to the Committee's action of disbarment filed on October 9, 1991, and held that the action was not time barred. The court also stated that it was the conviction or guilty plea that triggered the mandatory disbarment action against an attorney. The court further noted that any deferment of action until conviction inured to petitioner's benefit since he was "permitted to continue his practice of law in the state courts while his case meandered in its course

for some ten (10) years of trial, appeal, and re-hearings in the federal system." The case was then remanded for further proceedings. *Neal v Wilson,* 873 S.W.2d 552, 16 Ark. 588 (1994) Judge Hanshaw who had heard the first case by assignment asked to be relieved and the case was re-assigned to Judge Lineberger.

B. Second Circuit Court Ruling; and

C. Federal Court Removal and Rulings.

The above proceedings are discussed jointly because of overlapping issues discussed in the opinions.

Perhaps the most objective analysis of the 2nd state circuit court ruling is found in the opinions of United States District Court and the Eighth Circuit Court of Appeals. In *Neal v. Wilson*, 920 F. Supp. 976 (1990) the court stated in its opinion as follows:

> Prior to that time, as a result of a settlement reached in a Federal voting rights case, new electorial sub-districts were created providing for a majority of black voters in some electorial sub-districts, including the one in which the Helena, Arkansas, area is located. Mr. Olly Neal, an African American, was elected to that judgeship. In spite of the fact that the case was clearly assigned to Judge Lineberger and that Judge Linberger had declined to recuse and have the case re-assigned to Judge Neal, Judge Neal attempted to assume jurisdiction and set a hearing for May 18, 1995. The committee, through its attorney, Mr. Donovan, appeared on that date and contested

> Judge Neal's jurisdiction to proceed. Judge Neal ruled that he did have jurisdiction to proceed in the case and decided it on its merits.
>
> (FN 5) The committee contends that Judge Neal was disqualified from hearing the case because he was a law partner of Mr. Wilson until sometime in 1988 and, in fact, was one of the attorneys representing him in the very criminal proceeding which this disbarment proceeding is all about. It is contended that he, in fact, received, either on behalf of himself or in behalf of a client, some of the funds that were wrongfully obtained by Mr. Neal (sic) from the Farmers Home Administration, and that he, by stipulation, testified by letter in the criminal trial.

In affirming the district court the Court of Appeals in *Neal v. Wilson*, 112 F.3d 351 (8th Cir. 1997) stated:

> Wilson moved for Judge Lineberger's disqualification on the basis that there was a new Circuit Judge in Phillips County who had not recused himself who should hear the case. That judge was Olly Neal, an African American who had been elected in 1992 in a minority-majority district, newly created pursuant to a consent decree in a voting rights act lawsuit. Mr. Neal was Wilson's former law partner and one of the attorneys who represented Wilson in his criminal case. Neal also testified at Wilson's federal trial.
>
> Judge Lineberger denied the disqualification motion on January 5, 1995, and set a trial date of June 13, 1995. At Wilson's instigation, a hearing was set

> before Judge Neal. Following the hearing, Judge Neal ruled on May 24, 1995, that he had jurisdiction. He then decided the case on the merits, concluding that Wilson's conduct warranted only a letter of reprimand. The committee sought a Writ of Certiorari from the Arkansas Supreme Court. The Supreme Court issued the writ on June 12, 1995, ruling that Judge Neal did not have jurisdiction and quashing Judge Neal's orders. See *Neal v. Wilson*, 321 Ark. 70, 900 S.W.2d 177 (1995).

The Eighth Circuit also stated in its opinion as follows:

> Wilson argues that the state authorities have acted in bad faith by seeking a reversal of two circuit court decisions favorable to Wilson and that the conduct of the state authorities and the Arkansas Supreme Court shows that Wilson's federal rights will not be honored in state court. *** We agree with the district court that Wilson has proffered no evidence of bad faith, harassment, or other circumstances that might render abstention inappropriate. The Arkansas Supreme Court reversed the two previous Circuit Court rulings on state law grounds, and Wilson has the opportunity in the current state proceeding to raise his federal claims. As we noted above, the district court characterized Wilson's contentions of bad faith by the defendants as "little more than a belief by him that, since the state actors disagree with him and his lawyers, they must have racially discriminatory motives."

The case was then returned to the state trial court and a new judge was assigned when Judge Lineberger recused. The case was then presented to the trial court a third time.

D. Third Circuit Court Ruling.

In *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (1998), the Supreme Court affirmed the trial court on the first six issues and reversed only on the final issue of sanctions. The issues presented are as follows:

> **I. Double Jeopardy and Collateral Estoppel.** The Court held that petitioner was procedurally barred from raising these arguments on appeal because they were not raised below or ruled upon by the trial court.
>
> **II. Request for Extensions.** Here petitioner contended that the committee violated his right to procedural due process when it denied his request for an extension to prepare a response to the initial complaint filed before the Committee. In its opinion the court noted that the petitioner had twenty (20) days to file a written response and that instead of filing a response Wilson's attorney asked for an extension of time which was granted in part. The Court held that a one month extension was reasonable because petitioner had already had twenty (20) days to respond and was represented by competent counsel who could have helped him prepare his response. The Court also held that a denial of a second request for extension did not violate petitioner's rights because he had already been allowed almost two months instead of the usual twenty (20) days to file his response.

III. Constitutionality of the procedures regulating professional conduct. Petitioner argued that the rules are unconstitutional because the committee had discretion to determine what crimes constitute a violation of Model Rule 8.4(b) and to arbitrarily choose when they will pursue disbarment. The Court found no merit in these arguments because the rules "unambiguously proclaims" that the committee "shall" institute a disbarment action when it determines that a crime constitutes a violation of Model Rule 8.4(b). The Court noted that the committee had no discretion whether or not to file a disbarment action and that it was ultimately the trial court that determined whether there had been a violation of the model rules and whether disbarment was an appropriate sanction.

IV. Discovery. The Court held that the majority of the information requested by petitioner in his discovery was a matter of public record that could easily have been obtained from the Arkansas Supreme Court Clerk pursuant to Rule 4(c) of the Procedural Rules. The Court also noted that on hearing petitioner's motion to compel the executive director of the committee voluntarily took the stand and answered many of Wilson's questions about other attorneys who had been convicted of criminal offenses. The Court also noted that the Committee had presented its files which were reviewed in camera by the trial court. The Court also noted that the trial court's finding that petitioner had over five years to engage in meaningful discovery and that he had been "less than diligent."

V. Violation of Model Rule 8.4(b). The Arkansas Supreme Court found that the trial court erred that it found that the law of the case mandated summary judgment in favor of the committee. However the Supreme Court found as a matter of law that the "undisputed facts" established that petitioner's federal convictions constituted a violation of Model Rule 8.4(b). The court noted that it had no hesitancy in holding that the convictions reflected adversely on petitioner's fitness to practice law.

VI. Right to a Full Trial. The Arkansas Supreme Court held that the language in Section 5(g)(1) of the rules did not guarantee the petitioner an absolute right to a full trial that precluded the entry of summary judgment.

VII. Appropriate Sanction. The Supreme Court held that the trial court erred in its finding that petitioner "must be disbarred as a matter of law" according to Section B(6) of the procedural rules. The court stated that the rules did not "limit the sanctions the court may impose." On remand the court specifically directed that the parties should be able to present evidence and arguments on which of the four sanctions were appropriate in the case. The court also specifically listed the elements published by the American Bar Association Joint Committee on Professional Standards as the aggravating and mitigating factors to be considered.

E. Fourth Circuit Court Ruling. On remand the Circuit Court conducted a "Sanctions" hearing to consider aggravating and mitigating factors. After a hearing the Circuit Court suspended petitioner's license for five (5) years giving credit for previous suspension time. Petitioner again appealed and the Arkansas Supreme Court could not reach a consensus opinion on the core issue of the proper sanctions. Thus the five year suspension was affirmed.

REASONS FOR DENYING THE WRIT

The only question actually presented by the petition is whether the Arkansas Supreme Court rules governing professional conduct of attorneys meets constitutional standards as written and applied.

The Arkansas Supreme Court rules regulating the professional conduct of attorneys are reported as *Matter of Procedures of Arkansas Supreme Court*, 792 S.W.2d 323 (Ark. 1990). These rules meet constitutional standards as written and interpreted by the Arkansas Supreme Court and the federal courts.

Plainly stated, the Arkansas rules authorize the Committee on Professional Conduct to warn, reprimand, or suspend attorneys up to one (1) year for a violation of the model rules. When the Committee finds that disbarment may be warranted, it must cause a complaint to be filed in the Circuit Court which has jurisdiction to warn, reprimand, suspend, disbar or dismiss "as the evidence may warrant." In this case the trial court suspended petitioner for five years and the petitioner asserts that his constitutional rights were violated arguing that the rules limit the circuit court's jurisdiction to suspend to one year and any other

interpretation gives "unfettered and unlimited discretion" in imposing sanctions. Petitioner argues that such discretion violates constitutionally protected rights as written and applied.

Petitioner also alleges racial discrimination based upon his perception of other cases. This issue was not presented to the Arkansas Supreme Court. Nevertheless respondent will demonstrate that the facts do not support petitioner's allegation.

ARGUMENT

In general, the petitioner contends that the *Procedures of the Arkansas Supreme Court Committee on Professional Conduct* ("Procedures") limits the suspension of an attorney's license to one year and that the imposition of a five year suspension of his license was the result of "unfettered and unlimited discretion by Arkansas Judges and Justices in fashioning sanctions" thereby violating his constitutional rights of due process and equal protection. The petition also contains allegations of racial discrimination. The petitioner in his brief divides his argument into the following five categories:

> A. The exercise of absolute discretion results in an unconstitutional outcome; (Pg. 11)
>
> B. Rulings by Arkansas Courts in similar attorney discipline matter have reached disparate results; (Pg. 15)
>
> C. The comity usually accorded by this court to state court attorney discipline proceedings is not

to be a bar to the court's need to review the judgment involved here; (Pg. 20)

D. This court must review the petitioner's federal constitutional claims, because the Arkansas court has refused to do so; (Pg. 23)

E. The rules of construction for state court disciplinary rules and procedures must be governed by federal constitutional standards. (Pg. 25)

Four of the above five points relied upon in the petition involve the interpretation of the Procedures of the Arkansas Supreme Court Committee Regulating Professional Conduct of Attorneys and will be consolidated in respondent's argument. These rules are sometimes referred to by the Arkansas Supreme Court as ("Procedures").

A. Consolidated argument of Points raised in Paragraphs A, C, D & E:

The Arkansas Court is granted authority to regulate the practice of law by Amendment 28 to the Arkansas Constitution which simply states: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law." Pursuant to this constitutional authority the Arkansas Supreme Court has enacted the "Procedures" which have been amended from time to time. The "Procedures" governing this petition were enacted by the Arkansas Supreme Court in 1990. The full text of these "Procedures" are published under the title *Matter of Procedures of Ark. Supreme Ct.*, 792 S.W.2d 323.

The portions of the "Procedures" relevant to this proceeding are as follows:

PROCEDURES OF THE COURT REGULATING PROFESSIONAL CONDUCT OF ATTORNEYS AT LAW

SECTION.	SECTION.
1. Scope	5. Procedure
2. Committee	6. Criminal Activity.
3. Executive Director	7. Sanctions.
4. Confidentiality/Records	8. [Deleted].

SECTION 5.
PROCEDURE

B. NOTICE OF ATTORNEY. At the direction of the Committee or upon a determination by the Executive Director that a complaint should be processed as a formal complaint, the Executive Director shall:

(1) Furnish to the attorney complained against a copy of the formal complaint and advise the attorney that he may file a written response in affidavit form with any supporting evidence desired. The attorney's mailing address on record with the clerk shall constitute the address for service. Certified mailing of the formal complaint to said address shall be deemed service on the attorney.

(2) Advise the attorney that should the attorney be dissatisfied with the ballot vote, the attorney shall have the right to a subsequent hearing.

C. TIME FOR RESPONSE. (1) Upon receiving information of such complaint, the attorney shall have twenty (20) days in which to file a written response consisting of an original and eight (8) copies with the Executive Director. In the event that the Executive Director has not received a response within twenty (20) days following the date of the last notice of attempted delivery by the U. S. Postal Service, the Executive Director shall proceed to issue ballots as provided in subsection D of this Section.

(2) The Executive Director is authorized to grant, at the request of an attorney, an extension of reasonable length for the filing of a response. Subsequent requests for extensions must be in written form and will be ruled on by the Chairman of the Committee.

* * *

D. VOTE BY BALLOT. (1) At such time as the Executive Director has received from the attorney a written response or the attorney has failed to respond within the period provided in subsection C of this Section, the Executive Director shall assign the case a docket control number and shall cause to be prepared seven copies of the complainant's affidavit, the response, rebuttal and exhibits, if any, and such other information, memoranda, and recommendations which the Executive Director may

deem relevant and shall send a copy thereof to each member of the Committee.

* * *

E. RESULTS OF BALLOT VOTE.

(5) If a majority of the Committee votes by paper ballot to initiate disbarment proceedings, the Committee shall proceed as set out in subsection G of this Section and there shall be no hearing before the Committee.

G. ACTIONS FOR DISBARMENT. (1) An action for disbarment shall be filed with the Clerk of the Circuit Court of the county in which the attorney resides, or in which the alleged violation was committed. In disbarment suits, the action shall proceed as an action between the Executive Director and the respondent. Proceedings in the Circuit Court shall be held in compliance with the Arkansas Rules of Civil Procedure and trial shall be had before the Circuit Judge without a jury.

(2) *If the Circuit Judge finds that the attorney has violated the Model Rules,* he *shall caution, reprimand, suspend, or disbar such attorney as the evidence may warrant. If the Judge finds that the complaint of the Committee is not sustained by the evidence, the proceedings shall be dismissed.*

* * *

SECTION 6.
CRIMINAL ACTIVITY

* * *

B. PROCEDURES UPON CONVICTION. (1) When a complaint against an attorney is based on a conviction of a felony or a crime which also violates Rule 8.4(b) of the Model Rules of Professional Conduct, the Committee *shall* institute an action of disbarment.

* * *

(2) *Actions for disbarment based on the conviction of a crime shall proceed in accordance with the procedures in subsection G of Section 5 of these procedures.*

(3) A certified copy of the judgment of conviction shall be conclusive evidence of the attorney's guilt.

(4) The attorney may not offer evidence inconsistent with the essential elements of the crime for which he was convicted.

* * *

SECTION 7.
SANCTIONS

A. SANCTIONS AUTHORIZED.

When the *Committee* finds that an attorney has violated any provision of the Model Rules, the Committee is authorized:

(1) To warn (which shall be confidential); or

(2) To issue letters of caution or reprimand; or

(3) *To suspend the attorney for a period up to but not exceeding one (1) year; or*

(4) *To cause a complaint to be prepared and filed with the Circuit Court of proper venue in accordance with the manner provided for disbarment actions in subsection G of Section 5 of these Procedures; or* (Emphasis added by Respondent)

* * *

In 1976 the Arkansas Supreme Court interpreted an earlier version of the "Procedures" in the case of *In re Louis Art Doddrill,* 260 Ark. 223, 538 S.W.2d 549 (1976), where the Court held that the circuit court had the power and authority to impose a lesser penalty. Although a different version of the "Procedures" are now in existence the relevant portions concerning the imposition of a lesser penalty remain substantial identical. Because of the short length of the

decision in *Doddrill* the full decision of the Court is quoted herein as follows:

> In February, 1975, the circuit court rendered a judgment suspending petitioner's license to practice law for twelve months and ordering that his license be reinstated thereafter only upon the petitioner's satisfactory passing the regular examination for admission to the Bar administered by the State Board of Bar Examiners. Petitioner argues that the provision of the court's judgment which requires him to satisfactory pass the regular bar examination is a nullity because the circuit judge was without the power or authority to impose such a condition on the reinstatement of his suspended license. Therefore, petitioner asserts that since the one year period of suspension is completed his license shall be forthwith reissued to him.
>
> Proceedings involving the disbarment of an attorney are civil in nature. *Hurst v. Bar Rules Committee of the State of Arkansas,* 260 Ark. 223, 224, 538 S.W.2d 549, 202 Ark. 1101, 155 S.W.2d 697 (1941). Amendment 28 to the Arkansas Constitution (1874) provides:
>
> > The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at Law.
>
> Rule 5 of our Supreme Court Rules on Professional Conduct (1973), promulgated

pursuant to Amendment 28, provides in pertinent part:

> If the Judge or Chancellor finds, upon the hearing before him, that the attorney has been guilty of professional misconduct, he shall reprove, reprimand, suspend, or disbar such attorney, as the testimony may warrant . . .
>
> Either the Committee or the attorney defendant may appeal to the Supreme Court from the action taken by the Judge or Chancellor. . . .

Further, as to jurisdiction, it was succinctly said in *Feldman v. State Board of Law Examiners*, 438 F.2d 699 (8th Cir. 1971):

> The principle is firmly established that the judicial branch of the government, acting through the courts, has exclusive jurisdiction to admit, control and disbar attorneys.

Here, in a disbarment proceeding, the trial court clearly had jurisdiction with the power and authority to impose the lesser penalty; i.e. to conditionally suspend petitioner's license "as the testimony may warrant. . . ." which we equate with the imposition of reasonable conditions upon termination of the suspension. If the condition was unacceptable when imposed, petitioner's remedy

> was by appeal to test the reasonableness of the condition. Admittedly, petitioner failed to exercise his right of appeal within the proper time. Consequently, he is not entitled to a review of his petition which asserts that the court was without the power and authority to require him to pass the bar examination as a condition to the reinstatement of his license.

Petition denied. (Emphasis added by Respondent)

It is with this background that the Arkansas Supreme Court considered the within case in view of the due process and equal protection issues presented. In *Wilson v. Neal*, 341 Ark. 282, 16 S.W.3d 228 (2000), Justice Brown addressed the five-year suspension issue under the present procedures as follows:

> He maintains, however, that our Procedures should be construed so as to limit the circuit judge and this court to a one-year suspension. That is not a correct reading of our Procedures. Under the Procedures in force in 1990, they provided that the Committee was authorized to suspend an attorney from the practice of law for one year. But, a separate section of the Procedures sets forth authority of the circuit judge as opposed to the Committee, once a disbarment action has been filed in that court. If a finding is made that one or more of the Model Rules of Professional Conduct have been violated, the circuit judge in a disbarment action "shall caution, reprimand, suspend, or disbar such attorney as the evidence shall warrant." 1990 Procedures, §5G. (2). Thus,

the whole panoply of sanctions is available to a circuit judge and, concomitantly, to this court. And there is no basis for concluding that because the Committee can suspend a lawyer from the practice for up to one year, circuit judges are similarly limited when meting out sanctions in a disbarment action. Our rules are so clear on this point that there is no valid basis for invoking the canons of statutory construction, as Justice Smith has done. To do so takes a limitation on the Committee's power and impresses it on the circuit judges in disbarment proceedings, which was never contemplated by our Procedures. In sum, the circuit judge in this case had the authority to suspend Mr. Wilson from the law practice for five years.

Nor do I see that Mr. Wilson's due process rights were jeopardized by imposition of a sanction (five-year suspension) of which he contends he had no notice. Again, our Procedures clearly give circuit judges full authority to suspend as the evidence warrants in disbarment matters. This court has found a violation of an attorney's due process rights when that attorney was not notified of a specific rule violation for which he or she might have been sanctioned. See, e.g., Colvin v. Committee on Professional Conduct, 305 Ark. 239, 806 S.W.2d 385 (1991). Here, though, Mr. Wilson was fully apprised of the fact that his sanction might be disbarment. Under these facts it makes little sense to contend that the assessment of a lesser sanction which is authorized by our Procedures violated his right to due process.

Petitioner's argument before the Arkansas Court, as here, is that the "sanctions" section of the "Procedures" limits the committee's authority to suspend for one year and that the circuit judge is equally limited. (§ 7A(3)) Petitioner also attaches significance to the section titles contained in the "Procedures" and argues that a section entitled "Procedure" (Section 5) cannot give authority for "sanctions" which petitioner argues must be found exclusively in the section so titled. (Section 7) The Arkansas Supreme Court has elected to name the entire document regulating professional conduct as "Procedures" even though the document clearly describes the sanctions that can be rendered. The "Procedures" also prescribe the committee's jurisdiction to impose sanctions extending from a warning to a suspension not to exceed one year (Sec. 7A(1), (2), and (3). The committee has no jurisdiction regarding disbarment other than to cause a complaint to be prepared and filed with the circuit court under sub-section (g) of Section 5 of the Procedures. (Procedures, Section 7A(4). Jurisdiction for the disbarment action proceeds under Section 5G which specifically gives the Circuit Judge authority to dismiss, caution, reprimand, suspend or disbar "as the evidence may warrant."

A reading of the procedural rules by the petitioner at the time the petitioner pled guilty would have informed him that a disbarment action by the committee was mandatory. (Section 6B(1)) of the Procedures. A reading of the next paragraph of Section 6B would have advised the petitioner that an action for disbarment "shall proceed" in accordance with "sub-section G of Section 5 of these Procedures". A reading of sub-section G of section 5(2) of the procedures also would have informed the petitioner that the circuit judge would have authority to dismiss the complaint, issue a caution, reprimand, suspension or

disbarment "as the evidence may warrant." Had there been any doubt remaining in the petitioner's mind at that time elementary research of Arkansas decisions interpreting the "Procedures" would have led him to *In re Louis R. Doddrill,* 260 Ark. 223, 538 S.W.2d 549 (1976) where the court held that the trial court had authority to require the petitioner to retake the bar examination as the imposition of a lesser penalty.

B. Rulings By Arkansas' Courts in Similar Attorney Disciplinary Matters Have Not Reached Disparate Results. (Pg. 15)

1. A comparison of the Wilson and Matthews proceeding.

First, Mr. Wilson never argued the comparisons between the Matthews (a white attorney) proceedings and his own (an African-American attorney) proceedings before the Arkansas Supreme Court. As such, the Court should not entertain them now. However, if the Court decides to compare the proceedings involving Mr. Matthews and himself, a full and accurate review of the facts of each case must be presented. The facts in Mr. Matthew's case are established in *Neal v. Matthews,* 342 Ark. 566, 30 S.W.3d 92 (2000). Mr. Matthews pled guilty to two counts of bribery of a small business investment official, a federal misdemeanor in violation of 18 U.S.C. § 215. Matthews received two twelve month prison sentences, with four months of the second sentence to run concurrent with the first. Ultimately, he served fourteen months and there was no restitution to be paid. The trial judge sanctioned Mr. Matthews by suspending his license for 14 months; running the suspension retroactively and immediately reinstating him to the practice of law.

Mr. Wilson pled guilty to three counts of 18 U.S.C. § 658, knowingly disposing of soybeans and rice that were mortgaged and pledged to the FmHA, and two counts of violating 18 U.S.C. § 641, knowingly taking money from a Department of Agriculture bank account and using it for unapproved purposes. All were misdemeanor violations. Mr. Wilson was sentenced to four and one half months in prison with three years of probation.

After disbarment trials and appeals of those trials, both Wilson and Matthews received a suspension of their respective law licenses for five years. It would seem that any disparity due to the circuit judges in this case has been cured by the Arkansas Supreme Court.

2. A comparison of the Meurer and Hollingsworth proceedings.

Mr. Wilson never argued the comparisons between the Meurer (a white attorney) proceedings and the Hollingsworth (an African-American attorney) proceedings before the Arkansas Supreme Court. The Court should not entertain them now. However, if the Court decides to compare the proceedings involving Mr. Meurer and Mr. Hollingsworth, a full and accurate review of the facts of each case must be presented. Mr. Meurer was retained by his client in February, 1997, to file a Chapter 13 bankruptcy petition and was paid a sum of money for his services. Mr. Meurer never filed the petition despite numerous communications from his client. Subsequently, his client's home was lost in foreclosure and she filed her grievance against him with the Committee. The Committee issued a sanction which was appealed by Mr. Meurer. The appeal was de novo to the Committee. On February 12, 1999, Findings of Fact and Consent to Discipline Order (Consent Order) was entered.

(*See* Respondent's Appendix) The Order evidences that Mr. Meurer entered into this Order with the consent of his complaining client. In the Order, Mr. Meurer accepted a reprimand as a sanction for his professional misconduct. As part of the sanction, Mr. Meurer agreed to pay $18,000 in restitution to his client in equal monthly payments of $300. The $18,000 represents the client's lost equity in her home that she lost in the foreclosure. The $18,000 was not money taken from the client as Mr. Wilson asserts.

Meurer failed to make the first payment. The Committee then filed a Petition to Show Cause with the Arkansas Supreme Court. Mr. Meurer personally appeared before the Arkansas Supreme Court and admitted his failure to comply with the Consent Order. Mr. Meurer then made certain statements to the Court and filed an affidavit that was later determined to be untrue. On September 23, 1999, the Arkansas Supreme Court found Mr. Meurer in contempt and reinvested the Committee with jurisdiction to recommend a sanction for his contempt. *See In re Meurer*, 338 Ark. 601, 999 S.W.2d 196 (1999). The Committee recommended disbarment which it completed on June 22, 2000. *See In re Meurer*, 341 Ark. __, 23 S.W.3d 220 (2000). Mr. Wilson is incorrect in his petition when he stated that Mr. Meurer was allowed to voluntarily surrender his license. It is true that in the fall of 1999, the Committee suspended Mr. Meurer's license when he defaulted on two complaints filed against him by former clients. (*See* Respondent's Appendix) Neither complaint involved the theft of client funds.

The details of the Hollingsworth proceedings can be found at *Neal v. Hollingsworth,* 338 Ark. 251, 992 S.W.2d 771 (1999). Mr. Hollingsworth was representing a decedent's estate. He placed the estate's funds in his client trust account, instead of opening a separate trust account. During the five plus years

that he represented the estate, Mr. Hollingsworth failed to file required and appropriate accountings and notices to interested parties which prevented discovery of his misconduct. At one point, the estate balance in Hollingsworth's trust account was $107,888.07. The balance of all Mr. Hollingsworth's client trust moneys was $182.62, a difference of $107,705.45. The Hollingsworth opinion found that Mr. Hollingsworth acted almost entirely without authority of the Probate Court and used the estate's money for his own purposes for a period exceeding five years. True, by the time of the disbarment hearing Mr. Hollingsworth had repaid the principal of the sums misappropriated; he had not repaid the estate the interest lost on those moneys. True, the trial Court only sanctioned Mr. Hollingsworth with a six month suspension and on appeal the Arkansas Supreme Court reversed and remanded the sanction for disbarment which was completed on November 11, 1999. *See In re Hollingsworth*, 339 Ark. __, 4 S.W.3d 492 (1999).

Mr. Wilson alleges that the two attorney discipline cases evidence a violation of the equal protection clauses of the Fourteenth Amendment. It is obvious that any reasonable comparison does not support such a contention.

PERCEIVED MISSTATEMENTS OF FACT OR LAW IN THE PETITION BEARING ON WHAT ISSUES PROPERLY WOULD BE BEFORE THE COURT:

1. The petitioner's statement that "These misdemeanor counts were modified to eliminate all elements of culpability from 18 U.S.C. § 558 and 18 U.S.C. § 641, except the 'knowing' element," is perceived by the respondent as a misstatement. (Petition, Page 3)

2. Petitioner's statement that he was notified of the pending disciplinary action by "general mail" is perceived by the respondent as a misstatement. (Petition, page 3)

3. Petitioner's statement that he objected to the initiation of the disciplinary proceedings on the basis of violations of his constitutional due process rights, is perceived by the respondent as a misstatement. (Petition, page 3)

4. Petitioner's inference that he did not have an attorney representing him at the initial stage of the proceedings is perceived by the respondent as a misstatement. (Petition, page 3-4)

5. Petitioner's statement that the disbarment was based upon "petitioner's actions" which occurred in 1981 and 1982 is perceived by the respondent as a misstatement because the disbarment proceedings were based upon respondent's subsequent "conviction." (Petition, Page 5)

6. Petitioner's statement that the respondent's filing of a petition for writ of certiorari to the Arkansas Supreme Court was because the punishment imposed was not as severe as requested is perceived by the respondent as a misstatement. (Petition, Page 5) The petition for writ of certiorari to the Arkansas Supreme Court was based upon the trial judge's lack of jurisdiction to hear the matter.

7. The petitioner's statement that there was a "total lack of any established standards to be applied by the judges and justices of Arkansas Courts in imposing sanctions" is perceived by the respondent to be a misstatement. (Petition, Page 12 and 21)

8. Petitioner's statement that it was determined by the Arkansas Supreme Court that "no statute of limitations applied to attorney disciplinary proceedings" is perceived by the respondents is a misstatement. (Petition, Page 21)

9. Petitioner's statement that the Arkansas Supreme Court held that "duly elected judges within the jurisdiction where the complaint was filed (if African American) do not assume the same judicial authority to hear cases and causes authorized by Article 7 of the Arkansas Constitution" is perceived by the respondent as a misstatement. (Petition, page 21)

10. Petitioner's statement that the Arkansas Supreme Court under authority of Amendment 28 of the state constitution has "the right to displace duly elected judges even where there has been no recusal of the duly elected judge" is perceived by the respondent as a misstatement. (Page 21)

11. Petitioner's statement that the Arkansas Supreme Court held that the ruling of a "defacto judge did not activate the doctrines of res judicata, collateral estoppel or double jeopardy and any subsequent prosecution of the same party" is perceived by the respondent as a misstatement. (Petition, Page 21)

12. Petitioner's factual review of *In re Meurer* contains several statements that are perceived by the respondent as misstatements. (Petition, Page 18) The specific misstatements are discussed in respondent's brief.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this honorable Court deny the petition.

Respectfully submitted,

LYNN WILLIAMS
STAFF LITIGATION ATTORNEY
ARKANSAS SUPREME COURT
COMMITTEE ON PROFESSIONAL
CONDUCT
Justice Building - Room 110
625 Marshall Street
Little Rock, AR 72201
(501) 376-0313

ROBERT J. DONOVAN
Counsel of Record
DAGGETT, VAN DOVER,
DONOVAN & PERRY, PLLC
P.O. Box 646
12 South Poplar Street
Marianna, AR 72360
(870) 295-3434

Attorneys for Respondent

APPENDIX

APPENDIX A — FINDINGS AND CONSENT ORDER OF DISCIPLINE OF THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT *IN RE ROBERT FULLER MEURER*, CPC DOCKET NO. 98-057 DATED FEBRUARY 8, 1999 AND FILED FEBRUARY 12, 1999

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

IN RE: ROBERT FULLER MEURER
ARKANSAS BAR ID#85108
CPC DOCKET NO. 98-057

FINDINGS AND CONSENT ORDER OF DISCIPLINE

The formal charges of misconduct arose from the complaint of Tressia Russell. Ms. Russell was represented by Robert Fuller Meurer, an attorney residing and primarily practicing in Searcy, White County, Arkansas in the matter of a possible bankruptcy which was never filed. Mr. Meurer requested a de novo hearing before the Committee, but immediately prior to the scheduled hearing he entered into the following Findings and Consent Order of Discipline which was accepted and approved by the Committee.

Ms. Russell referred matters to the Committee that occurred from February, 1997 until the present. Ms. Russell met with Mr. Meurer in February, 1997 for a consultation on filing a bankruptcy petition under Chapter 13. Among other indebtedness, Ms. Russell was in arrears on her home mortgage payments. She was quoted an advance fee of $300.00 which she paid by money order and delivered to Mr. Meurer by United States Mail on March 21, 1997. No petition for bankruptcy was filed.

Appendix A

Ms. Russell confronted Mr. Meurer in July, 1997 regarding the status of the bankruptcy petition after she saw a notice in the Des Arc newspaper of a foreclosure sale of her home set for November 12, 1997. Mr. Meurer denied that Ms. Russell had ever paid him the advance fee. On August 11, 1997, she presented him a copy of the United States Post Office trace and copy of the money order personally endorsed by Mr. Meurer on March 21, 1997. He then proceeded to obtain information from her to file a bankruptcy petition which he again never filed. Consequently, Ms. Russell relied on Mr. Meurer's representations that he was filing a bankruptcy petition and that he was taking care of the matter. Ms. Russell in reliance on Mr. Meurer's statements and believing that the foreclosure proceedings were stayed did not attend on the date scheduled for the foreclosure sale of her home. As a consequence of her mistaken belief, she sought no alternative financing and did not attempt to bid on the home at the sale. Ms. Russell's home was sold on November 12, 1997 and she lost the $18,000.00 in equity she had in the home. She requested her file from Mr. Meurer on April 1, 1998 and after a delay received it. To this date, Mr. Meurer has yet to refund any of the $300.00 fee paid by Ms. Russell.

Although Mr. Muerer initially asserted that he engaged in no improper, unethical or unprofessional conduct, upon reconsideration he offered to and agreed to enter into a consent to discipline pursuant to Section 8C(1)(c) of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, as revised January 15, 1998. As part of the offer seeking discipline by consent, the attorney, after consultation with his former client, agreed

to compensate her for the loss of the equity in her home. Upon consideration of the formal complaint response herein, and the proposed consent to discipline, the Committee on Professional Conduct finds that:

1. Mr. Meurer's conduct violated Model Rule 1.1, Arkansas Rules of Professional Conduct, when he failed to file a bankruptcy petition and protect Ms. Russell's property interest manifesting an utter lack of thoroughness and preparation necessary to represent his client, Ms. Russell. Model Rule 1.1, Arkansas Rules of Professional Conduct requires in pertinent part that a lawyer shall provide competent representation to a client, including the thoroughness and preparation reasonably necessary for the representation.

2. Mr. Meurer's conduct collectively and singularly, violated Model Rule 1.3, Arkansas Model Rules of Professional Conduct when despite representing Ms. Russell for almost one year, he completely and totally failed to take any legal action in Ms. Russell's behalf. This nonfeasance occurred despite Mr. Meurer knowing the date Ms. Russell's home was going to be sold in a foreclosure sale. Model Rule 1.3, Arkansas Model Rules of Professional Conduct requires that a lawyer shall act with reasonable diligence and promptness in representing a client.

3. Mr. Meurer's conduct collectively and singularly, violated Model Rule 1.4(a), Arkansas Model Rules of Professional Conduct when he failed to inform Ms. Russell that he was not going to file a bankruptcy petition or that he did not file the bankruptcy petition prior to Ms. Russell

foreclosure sale date. After preparing a petition for chapter seven protection in March, when the client had chosen a chapter thirteen petition, he failed to oversee that the correct petition was filed despite numerous telephone calls from Ms. Russell from March to July, 1997. Additionally, after he received her April 1, 1998 letter for the return of her file, he unreasonably delayed delivery of her file to her and her representative. Model Rule 1.4(a), Arkansas Model Rules of Professional Conduct requires that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable request for information.

4. Mr. Meurer's conduct violated Model Rule 1.16(d), Arkansas Model Rules of Professional Conduct, when he failed to promptly return Ms. Russell's file containing her papers upon her request of April 1, 1998, and by not refunding any of the $300.00 fee paid to him for service he failed to render to her. Model Rule 1.16(d) requires, in pertinent part, that upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the client's interests, such as surrendering papers and property which the client is entitled and refunding any advanced payment of the fee that has not been earned.

5. Mr. Meurer's conduct violated Model Rule 8.4(c), Arkansas Model Rules of Professional Conduct, when during the entire period of his representation of Ms. Russell, he mislead her into believing that he was filing a bankruptcy in her behalf providing her protection from her creditors and misleading Ms. Russell when he stated to her that he would "take care of everything" regarding the foreclosure of her house when in fact he did nothing. As a result, Ms. Russell

relied on Mr. Meurer and did not attend the foreclosure sale and attempt to take advantage of any of her possible remedies, which included hiring alternative counsel to file a bankruptcy petition. Model Rule 8.4(c), Arkansas Model Rules of Professional Conduct requires that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

WHEREFORE, in accordance with the consent to discipline presented by Mr. Meurer and the Executive Director, James A. Neal, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct that ROBERT FULLER MEURER, Arkansas Bar ID #85108, be, and hereby is REPRIMANDED for his conduct in this matter. Further, pursuant to Sections 8A(1) and 8A(3), it is the decision mid order of the Committee that Mr. Meurer be, and hereby is, assessed the costs in this matter of in the sum of $150.00 due and payable to the Committee at its offices on March 1, 1999, and ordered to make restitution to Ms. Russell in the amount of Eighteen Thousand Dollars and No Cents ($18,000.00). To evidence the terms of the restitution, Mr. Meurer will prepare and execute a promissory note in the amount of the restitution ($18,000.00) in favor of Ms. Russell with payment in equal monthly payments of $300.00 due the 1st of each month beginning February 1, 1999, until paid in full and otherwise reasonably satisfactory to Ms. Russell. Willful failure to make timely payments, in addition to the note's provisions for default, shall also be grounds for a citation of contempt by this Committee before the Arkansas Supreme Court and grounds for further sanction under the Model Rules and the Procedures of this Committee.

Appendix A

ARKANSAS SUPREME COURT
COMMITTEE ON PROFESSIONAL
CONDUCT

By: s/ Carlton Bailey
Carlton Bailey
Chairman

Date: February 8, 1999

APPENDIX B — FINDINGS AND ORDER OF THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT *IN RE ROBERT FULLER MEURER*, CPC DOCKET NO. 99-065 DATED SEPTEMBER 29, 1999 AND FILED OCTOBER 22, 1999

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

IN RE: ROBERT FULLER MEURER
ARKANSAS BAR ID#85108
CPC DOCKET NO. 99-065

FINDINGS AND ORDER

The formal charges of misconduct upon which this Order is based arose from the complaint of Deborah Mosley. Ms. Mosley retained Robert Fuller Meurer, an attorney primarily practicing in Searcy, White County, Arkansas to appeal the White County Chancery Judge's adverse decision rendered June 24, 1997, regarding the custody of her children. Ms. Mosley paid Mr. Meurer $3,500.00. On July 7, 1997, Mr. Meurer timely filed the notice of appeal with the White County Circuit Clerk. Ms. Mosley subsequently attempted to contact Mr. Meurer on the status of her appeal with little success. Ms. Mosley was once told by Mr. Meurer that her appeal was pending in the Arkansas Court of Appeals. Later, Ms. Mosley phoned Les Steen, Clerk of the Arkansas Court of Appeals, and discovered no appeal was filed. As of March 23, 1999, no appeal has been filed.

Mr. Meurer was personally served with a copy of the Formal Complaint, pursuant to Section 5E, Procedures of the Arkansas Supreme Court Regulating Professional

Appendix B

Conduct of Attorneys at Law (Procedures), as revised January 15, 1998. Mr. Meurer failed to respond to the Complaint. His failure to respond timely to the Complaint constitutes admission of the factual allegations contained in the Complaint pursuant to Section 5I(4) of the Procedures.

Upon consideration of the formal complaint, the failure to file a response herein and the Arkansas Model Rules of Professional Conduct, the Committee on Professional Conduct finds:

1. That Mr. Meurer's conduct violated Rule 1.3 when he accepted a $3,500 retainer to appeal his client's case of an adverse child custody decision by the White County Chancery Judge and then did not appeal the decision. Other than filing the notice of appeal, Mr. Meurer took no further action, i.e. ordering the transcript, lodging the transcript and filing the necessary briefs or motions to protect Ms. Mosley's appeal. Model Rule 1.3 requires that a lawyer act with reasonable diligence and promptness in representing a client.

2. That Mr. Meurer's conduct violated Rule 8.4(d) of the Arkansas Model Rules of Professional Conduct when he failed to perfect and file the appeal of his client, Ms. Mosley. His failure effectively denied her right to appeal the adverse child custody decision of the White County Chancery Court. Model Rule 8.4(d) states that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional

Appendix B

Conduct that ROBERT FULLER MEURER, Arkansas Bar ID #85108, be, and hereby is, SUSPENDED for ONE YEAR for his conduct in this matter. The suspension shall become effective as of the date of the filing of this Order with the Clerk of the Arkansas Supreme Court. Further, pursuant to Sections 5I(1) and 8A(2) of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, it is the decision and order of the Committee that Mr. Meurer be, and hereby is, fined in the amount of $250. The fine is imposed as a separate sanction for Mr. Meurer's failure to respond to the complaint.

ARKANSAS SUPREME COURT
COMMITTEE ON PROFESSIONAL
CONDUCT

By: s/ Carlton Bailey
Carlton Bailey
Chairman

Date: 9-29-99

APPENDIX C — FINDINGS AND ORDER OF THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT *IN RE ROBERT FULLER MEURER*, CPC DOCKET NO. 99-071 DATED SEPTEMBER 29, 1999 AND FILED OCTOBER 22, 1999

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

IN RE: ROBERT FULLER MEURER
ARKANSAS BAR ID#85108
CPC DOCKET NO. 99-071

FINDINGS AND ORDER

The formal charges of misconduct upon which this Order is based arose from the complaint of Kenneth Konopinski. In July, 1998, Mr. Konopinski retained Robert Fuller Meurer, an attorney primarily practicing in Searcy, White County, Arkansas for $150.00 for Mr. Meurer to file for an expungement of a criminal conviction. Mr. Meurer took no action. In November, 1998, Mr. Konopinski retained Mr. Meurer to represent Mr. Konopinski in a real property dispute. Mr. Konopinski paid $1,200 of the $2,000 requested by Mr. Meurer. No action was taken by Mr. Meurer. Prior to filing his complaint Mr. Konopinski had attempted to contact Mr. Meurer by telephone since December, 1998 without success. On March 24, 1999, Mr. Konopinski sent Mr. Meurer a certified letter to communicate with Mr. Meurer. The letter was returned to Mr. Konopinski, "unclaimed."

Mr. Meurer was personally served with a copy of the Formal Complaint, pursuant to Section 5E, Procedures of the Arkansas Supreme Court Regulating Professional

Appendix C

Conduct of Attorneys at Law (Procedures), as revised January 15, 1998. Mr. Meurer failed to respond to the Complaint. His failure to respond timely to the Complaint constitutes admission of the factual allegations contained in the Complaint pursuant to Section 5I(4) of the Procedures.

Upon consideration the formal complaint, the attorney's failure to respond, and the Arkansas Model Rules on Professional Conduct herein, the Committee on Professional Conduct finds:

1. That Mr. Meurer's conduct violated Model Rule 1.1, when in July, 1998, he was retained by Mr. Konopinski by verbal agreement for $150.00 to represent him in the expungement of a criminal record and failed to take any action; when in November, 1998, he was again retained by Mr. Konopinski to represent him in a real property dispute for which the attorney received 60% of the requested fee in advance and failed to take action. Model Rule 1.1 requires, in pertinent part, that a lawyer provide competent representation to a client, including the thoroughness reasonably necessary for the representation.

2. That Mr. Meurer's conduct violated Model Rule 1.3 when in July, 1998, he was retained by Mr. Konopinski for $150.00 to represent him in the expungement of a criminal record and failed to take any action; and, when in November, 1998, he was again retained by Mr. Konopinski to represent him in a real property dispute for which the attorney received 60% of the requested fee in advance and failed to take action. Model Rule 1.3 requires that a lawyer act with reasonable diligence and promptness in representing a client.

3. That Mr. Meurer's conduct violated Rule 1.4(a) of the Arkansas Model Rules of Professional Conduct, when despite numerous attempts by Mr. Konopinski to contact Mr. Meurer by telephone, the client was unable to communicate with Mr. Meurer; when on March 24,1999, Mr. Konopinski sent Mr. Meurer a certified letter to communicate with Mr. Meurer and the letter was return to Mr. Konopinski, "unclaimed." Model Rule 1.4(a) requires that a lawyer keep a client reasonably informed about the status of a matter and promptly reply with reasonable requests for information.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct that ROBERT FULLER MEURER, Arkansas Bar ID #85108, be, and hereby is, SUSPENDED for TWO YEARS for his conduct in this matter. The suspension shall become effective as of the date of the filing of this Order with the Clerk of the Arkansas Supreme Court.

ARKANSAS SUPREME COURT
COMMITTEE ON PROFESSIONAL
CONDUCT

By: s/ Carlton Bailey
Carlton Bailey
Chairman

Date: 9-29-99

APPENDIX D — MEMORANDUM OPINION AND ORDER OF REMAND AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION DATED MARCH 18, 1996

United States District Court,
E.D. Arkansas,
Western Division.

JAMES A. NEAL, as Executive Director of the Supreme Court Committee on Professional Conduct,

Plaintiff,

v.

JIMMIE L. WILSON,

Defendant.

JIMMIE L. WILSON,

Plaintiff,

v.

JACK HOLT, JR., Robert H. Dudley, Tom Glaze, and Donald Corbin, Members of the Supreme Court of the State of Arkansas, John Lineberger, Chancery Judge of the Fourth Judicial District of Arkansas; James Neal, Director of the Arkansas Supreme Court Committee on Professional Conduct; the Members of the Arkansas Supreme Court Committee on Professional Conduct; Robert Donovan,

Appendix D

Attorney for the Arkansas Supreme Court Committee on Professional Conduct; John Doe Defendants and other unknown, each individually and in his official capacity as set out herein,

Defendants.

Civil No. H-C-95-54.

March 18, 1996.

* * *

MEMORANDUM OPINION

H. FRANKLIN WATERS, Chief Judge.

This is a case in which the justice system of Arkansas, represented by the lawyers and the judiciary of this state, has not done itself proud. The long, tortured, and torturous route of this case through the courts of Arkansas, both state and federal, over many long years has ended up about where it started. In this court's view, this has resulted from the numerous lawyers in this case manipulating the system so as to derail it and bring this case to the stalemate that presently exists. The court also believes that the record reflects that the judiciary is not entirely blameless in allowing this to happen.

Although the conduct of Mr. Jimmie L. Wilson which will be described in detail below apparently occurred in 1981 and 1982, and although this case was filed in the Circuit

Appendix D

Court of Phillips County in October of 1991, this matter has gone virtually nowhere during the intervening years. Sadly, when this court ends this portion of the matter as it intends to do and places the case back on course, it will be sitting virtually at the same point on the course where it started.

Background.

As indicated, this all started in 1981 and 1982 when Jimmie L. Wilson, an African-American lawyer, farmer, state legislator, and civil rights activist from the Mississippi River delta region of Eastern Arkansas at or near Helena, stole money from the United States by scheming to sell mortgaged property and by withdrawing funds for unauthorized purposes by lying about the intended use of such funds. His conduct is described in United States v. Wilson, 806 F.2d 171 (8th Cir.1986), an opinion resulting from his first appeal of a conviction by a jury, thusly:

> Defendant practices law and operates a farm in Helena, Arkansas. Between February 1980 and April 1982 he borrowed approximately $775,230.00 from the FmHA for farm operating expenses with the loans primarily secured by an FmHA lien on his crops. To insure compliance with the security agreement entered into at the time of the loans, the FmHA circulated defendant's name on a list of FmHA borrowers to the grain dryers in the region of his farm. The grain dryers would then properly issue checks to defendant and the FmHA as co-payees as payment for crops transported from the farm.

Appendix D

> Between 1981 and December 1982, defendant made multiple sales of grain in the names of Willie Weaver and Reggie Wilson. Willie Weaver, defendant's cousin and co-defendant below, worked as a farm manager for defendant. Reggie Wilson is defendant's son and is a student, not engaged in farming. The government presented evidence that the proceeds from the sales made by Weaver and the junior Wilson, which were issued clear of the FmHA lien, went variously into defendant's law firm account, to cash, into his farm expense account, or toward payment on a bill for farm supplies.
>
> In May 1981, the FmHA required that supervised joint bank account be established in the names of the FmHA and defendant and his wife, Henrietta. FmHA loan proceeds were to be deposited into the joint account, and defendant was required to advise the FmHA of his intended use of funds prior to the time of any withdrawal. On various occasions, defendant would apply to the FmHA to have funds transferred from the joint account to his farm operating account from which he would retransfer the money to his law firm account. A substantial portion of funds was used for the purchase and maintenance of a Mercedes Benz.

Id. at 173.

In that decision and a prior decision later vacated by the court, the Court of Appeals held that the Supreme Court

decision in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) did not apply retroactively.[1] Subsequently, in Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) the United States Supreme Court held that, indeed, Batson should be applied retroactively. The Court of Appeals then vacated its prior decisions, United States v. Wilson, 815 F.2d 52 (8th Cir. 1987), and remanded the matter to the trial court to determine whether the requirements of Batson had been violated.

Judge G. Thomas Eisele held a hearing and determined that the government had adequately met the test required by Batson by showing that there were other legitimate non-discriminatory reasons for the prosecutor having exercised his peremptory challenges[2] to exclude certain black members of the jury panel from serving on the case. The Court of Appeals for the Eighth Circuit took the matter en banc and ruled, 7-4, that Judge Eisele's decision was clearly erroneous and that, in fact, the requirements of Batson had been violated. The conviction was reversed. United States v. Wilson, 884 F.2d 1121 (8th Cir.1989).

---

1. Of course, Batson held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the [government's] case against a black defendant." Batson, 476 U.S. at 89, 106 S.Ct. at 1719.

2. Of course, since Batson, the juror challenges that have been permitted for centuries at this stage of a trial are misnamed, since "peremptory challenge" means: "The right to challenge a juror without assigning, or being required to assign, a reason for the challenge." Black's Law Dictionary 1136 (6th Ed.1990).

Appendix D

In August of 1990 a plea bargain agreement was reached and Mr. Wilson, on August 22, 1990, appeared before Judge Stephen Reasoner and pled guilty to an information charging him with five misdemeanor counts involving essentially the same conduct for which he had been initially convicted as a result of the felony indictment returned by the grand jury. In pleading guilty to these charges, it appears that he admitted essentially the same conduct as was charged in the felony indictment. See pages 19-21 of the transcript of the sentencing hearing which was attached to the initial complaint filed in this case in state court. He was sentenced to a period of incarceration.

On January 10, 1991, Judge G. Thomas Eisele entered an order in behalf of the entire court for the Eastern District of Arkansas, reciting that, with all judges of the court concurring,[3] Mr. Wilson was immediately suspended from the practice of law in the Eastern District of Arkansas "until final disposition of any disciplinary proceedings commenced as a result of any such conviction." Judge Eisele, again acting for the entire court, by letter dated January 10, 1991, to James A. Neal, executive director of the Arkansas Supreme Court Committee on Professional Conduct, advised the committee of Mr. Wilson's conviction, and advised that he was referring the matter to the committee "for the institution of a disciplinary proceeding before the court in which the sole issue to be determined shall be the extent of the final

3. It was because of this action and his participation in it that Judge George Howard decided to recuse in this case and direct that the matter be transferred to a judge outside the Eastern District of Arkansas. That action resulted in the case being assigned to this judge.

disposition to be imposed as a result of the conduct resulting in the conviction." (quoting from Rule I-D of the Model Federal Rules of Disciplinary Enforcement adopted by the court's for the Eastern District of Arkansas.)

Mr. Neal advised Mr. Wilson by letter dated March 29, 1991, of the institution of the proceedings against him, and advised him of his right to respond to the charges. An attorney entered an appearance for him and made multiple requests for an extension of the time required to respond to the charges. One extension was granted, but subsequent attempts were denied by a letter to Mr. Wilson's attorney dated June 10, 1991, in which Mr. Neal explained that he had consulted with Mr. Eddie Walker,[4] the committee chairman, who had instructed him to deny the request for an additional extension. Mr. Wilson made no response to the charges, and by letter dated July 22, 1991, he was notified that it was "the unanimous decision of the Committee that your conduct in this matter violated the Model Rules of Professional Conduct" and that a disbarment proceeding would be instituted in the event that Mr. Wilson had not voluntarily relinquished his license to practice law in Arkansas within seven days from the receipt of the letter.

On October 9, 1991, a lawsuit was filed in the Circuit Court of Phillips County, Arkansas, seeking his disbarment. Subsequently, the regular judges for that circuit recused for

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4. Because of claims made in the matter by Mr. Wilson it is, perhaps, pertinent to note that the court knows that Mr. Walker, the chairman of the committee at the time, is a fine lawyer practicing in Fort Smith and was a former Arkansas Worker's Compensation Administrative Law Judge. He also happens to be of African descent.

cause and, months later, on February 21, 1992, the Chief Justice of the Arkansas Supreme Court appointed Judge Lance Hanshaw from Lonoke, Arkansas, in another judicial circuit, to preside in the case.

The case rocked along with numerous continuances being requested and granted until June 19, 1992, when Judge Hanshaw wrote the attorneys for the parties advising that he would deny Mr. Wilson's motion to dismiss the complaint and would grant the motion for summary judgment filed in behalf of the committee. In that letter he said that: "The Defendant's license to practice law is suspended for a period of two (2) years and he shall surrender his license to practice law effective August 1, 1992, and further comply with Rule 11 of the Rules of Professional Conduct adopted March 11, 1985." The attorney for the committee, Robert Donovan, whom Mr. Wilson has since made a party to this case, was directed to draft an order and judgment not inconsistent with the court's opinion.

However, some seven months later, for reasons not clear in the record, by opinion filed February 16, 1993, Judge Hanshaw apparently changed his mind and granted Mr. Wilson's motion to dismiss. Without citing any specific authority, he seemed to simply hold that "the State Committee chose to wait, too long, and the defendant's motion to dismiss is granted and the State's complaint for suspension is dismissed." No applicable statute of limitations or other authority was cited for this conclusion.

In Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994) the court, in an opinion written by Chief Justice Holt,

unanimously reversed the trial court and remanded the case to Judge Hanshaw with directions that he conduct further proceedings consistent with the opinion. However, in a letter dated April 20, 1994, by Judge Hanshaw to the Administrative Office of the Courts, Judge Hanshaw, incredibly, advised that it would be necessary to reassign the case to someone else "since the case has now been reversed and remanded by Chief Justice Jack Holt, Jr." In that letter, just as incredibly, he said:

> While my professional desire was to disbar Mr. Wilson, my research and understanding of the law was clearly explained in my opinion. I do so much disagree with the Chief Justice's opinion as to substance and law that I do not think that it would be appropriate for me to rehear this case.

On May 3, 1994, the acting Chief Justice of the Arkansas Supreme Court appointed Judge Lineberger to preside in the case under the authority of Act 496 of 1965 as amended. For some unknown reason, the order appointing Judge Lineberger was not filed by the Phillips County Clerk until September 14, 1994.

Again, the case rocked on for month after month with numerous requests for extensions of time and continuances being made. By letter dated October 27, 1994, Judge Lineberger set the matter for hearing on December 15, 1994. However, after Mr. Wilson filed a motion for continuance, and after he had also filed a motion asking Judge Lineberger to disqualify so that Judge Olly Neal could hear the case, the matter was continued by order dated December 12, 1994.

Subsequently, the case was reset for January 30-31, 1995, but once again, because Mr. Wilson pointed out that he would be required to be present at a session of the Arkansas Legislature during that period, the case was continued by order dated January 9, 1995. It was finally reset by letter dated April 26, 1995, to start on June 13, 1995, in Marianna, Arkansas. Of course, by this time the case was coming up on its fourth anniversary.

Prior to that time, as the result of a settlement reached in a federal voting rights case, new electoral sub-districts were created providing for a majority of black voters in some electoral sub-districts, including the one in which the Helena, Arkansas, area is located. Mr. Olly Neal,[5] an African-American, was elected to that judgeship. In spite of the fact that the case was clearly assigned to Judge Lineberger and that Judge Lineberger had declined to recuse and have the case reassigned to Judge Neal, Judge Neal attempted to assume jurisdiction and set a hearing for May 18, 1995. The committee, through its attorney, Mr. Donovan, appeared on that date and contested Judge Neal's jurisdiction to proceed.

Judge Neal ruled that he did have jurisdiction to proceed in the case and decided it on the merits. In an order signed

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5. The committee contends that Judge Neal was disqualified from hearing the case because he was a law partner of Mr. Wilson until some time in 1988 and, in fact, was one of the attorneys representing him in the very criminal proceeding which this disbarment proceeding is all about. It is contended that he, in fact, received, either in behalf of himself or in behalf of a client, some of the funds that were wrongfully obtained by Mr. Neal from the Farmers Home Administration, and that he, by stipulation, testified by letter in the criminal trial.

on May 24, 1995, and entered on May 25, 1995, Judge Neal found that Mr. Wilson had, in fact, violated the Arkansas ethics rules but directed that the only sanctions imposed against him would be a letter of reprimand. The committee sought a writ of certiorari in the Arkansas Supreme Court and by per curiam opinion delivered on June 12, 1995, the court, with two justices dissenting, held that Judge Neal did not have jurisdiction to take the action that he took because the jurisdiction for the case rested with Judge Lineberger pursuant to the court's earlier order. The court found:

> Because we find Judge Neal has proceeded in excess of his authority and jurisdiction, his directives and orders relating to the action between petitioner and respondent are quashed.

It appears from the file that Judge Lineberger, on June 13, 1995, was in Marianna prepared to begin the trial. However, on that same day, Mr. Wilson filed in the United States District Court for the Eastern District of Arkansas, Helena Division, a pleading showing that he was represented by eight separate lawyers or law firms. The pleading was denominated "Petition for Removal; Petition for Temporary and Permanent Injunctive Relief; and Complaint at Law." In so doing, he not only removed the state disbarment proceeding from the Circuit Court of Phillips County to federal court in Little Rock, he also sued about every state official and lawyer on the other side who had even touched the file up to that point. Made parties were all of the Supreme Court justices who had been in the majority on the writ of certiorari, Judge Lineberger, James Neal, the director of the Supreme Court Committee on Professional Conduct, and

each individual member of the committee, Robert Donovan, the committee's lawyer, and John Doe defendants "known and unknown."[6]

Although there is no evidence which can be gleaned from the file which, in any way, supports the allegations, it is alleged, among many other things, that the "Supreme Court members named herein, acquiesced to the petition of the defendants, and it is the belief of the plaintiff herein that the defendants acted conspiratorially to deny the plaintiff, Jimmie L. Wilson, of his constitutional rights asserted herein." It is alleged that it was "the ultimate goal of the defendants in this cause to destroy the plaintiff's legal practice, and to damage his ability to be re-elected to public office by their continuous and unrelenting persecution under color or law." Mr. Wilson and his attorneys point to no evidence to support these claims, and the only circumstance that might cause him to believe what he says is that these individuals did not ultimately agree with his position which he took in this proceeding which was working its way, albeit slowly, through the justice system.

After the case was filed in federal court in the Eastern District of Arkansas, the judge to whom it was assigned, George Howard, held a telephone conference call with counsel and advised that, since the federal court now had jurisdiction of the case, it did not appear that the temporary restraining order requested by Mr. Wilson was necessary. He also advised counsel that he had had a discussion with Judge Lineberger by telephone earlier that day and that Judge

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6. The court will collectively refer to these parties as "the State."

Lineberger recognized that his jurisdiction had ended and that he did not intend to proceed with the trial which was to have commenced that day. Counsel agreed that the restraining order was not necessary, under the circumstances, so no further action was taken other than the requirement of a cost bond and some discussion about proceedings that would follow.

While the files have multiplied almost exponentially by papers submitted by the lawyers since that time, little of a substantive nature has occurred during the more than nine months this case has been sitting in this court. Soon after the case was removed, a motion to remand pointing out reasons why this court did not have subject matter jurisdiction was filed, but no action was taken on it before Judge Howard recused. The file was received by this judge on the afternoon of March 11, 1996.

Motion to Remand.

The State requests the remand of the disbarment action to the Phillips County Circuit Court from which it was removed on June 13, 1995. The State asserts that the removal was improvident for the following reasons: (1) the matters sought to be removed are not civil actions within the meaning of the federal removal statutes and federal removal jurisprudence; (2) no federal question appears on the face of the state court complaint; (3) the petition for removal is time barred; and, (4) there are a number of procedural irregularities with the removal petition itself.

Wilson opposes remand arguing that removal was both timely and proper under the applicable removal statutes.

Additionally, Wilson argues that the disbarment proceedings are quasi criminal in nature and subject to constitutional safeguards. According to Wilson, the alleged violation of these constitutional safeguards states a federal cause of action and establishes the jurisdictional nexus with the petition to remove. The second amended petition for removal asserts that removal is based upon 28 U.S.C. § 1443 and § 1446(b).

"The right to removal from a state court to a federal court exists only in certain enumerated classes of actions, and in order to exercise the right of removal, it is essential that the case be shown to be one within one of those classes." Schwinn Bicycle Co. v. Brown, 535 F.Supp. 486, 487 (W.D.Ark.1982) (citations omitted). The removal statutes are strictly construed in favor of state court jurisdiction. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 61 S.Ct. 868, 85 L.Ed. 1214 (1941). Removal is effected when the notice of removal is filed in state court. Anthony v. Runyon, 76 F.3d 210 (8th Cir.1996).

The court has the duty to fully consider the pleadings filed in this matter and determine whether subject matter jurisdictions exists. Any action taken by a federal court which lacks subject matter jurisdiction is a nullity and either party, even the party that invoked the jurisdiction of the court, can attack jurisdiction at any time even after judgment is rendered against him. American Fire & Cas. Co. v. Finn, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951).

When determining whether removal is proper, a court may only examine the face of the complaint and cannot rely on an anticipated defense raised by the defendants. Franchise

Appendix D

Tax Board of the State of Cal. v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) (well-pleaded complaint rule). A federal question must be an essential element of the plaintiff's complaint to provide grounds for removal. Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127, 94 S.Ct. 1002, 1003-04, 39 L.Ed.2d 209 (1974). The plaintiff is, then, master of the complaint and can generally avoid federal jurisdiction by omitting claims that arise under federal law. Gully v. First National Bank in Meridian, 299 U.S. 109, 112-113, 57 S.Ct. 96, 97-98, 81 L.Ed. 70 (1936).

The state court complaint at issue asserts that Wilson violated the ethical standards for his profession and that disbarment is warranted under the applicable Arkansas state rules and procedures regulating professional conduct. The complaint does not rely upon the Constitution, laws, or treaties of the United States.

The only federal question raised in this case is by the defendant. Removal is therefore not proper, Caterpillar Inc. v. Williams, 482 U.S. 386, 393, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318 (1987), unless an exception to the well-pleaded complaint rule applies. Rogers v. Rucker, 835 F.Supp. 1410 (N.D.Ga.1993). Section 1443 provides a statutory exception to the well-pleaded complaint rule for certain civil rights actions. Id. at 1412.

However, this action does not fall within the class of cases removable under § 1443(1). Section 1443(1) provides for the removal by a defendant of any civil action or criminal prosecution "[a]gainst any person who is denied or cannot

enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof. . . ." 28 U.S.C. § 1443(1).

There are two broad restrictions upon removal under § 1443(1). "First, removal is limited to cases involving 'a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof,' and second, the petitioner for removal must show that he 'is denied or cannot enforce [such a right] in the courts of such State.' " Bar Association of Baltimore City v. Posner, 391 F.Supp. 76, 79 (D.Md.1975). See also Johnson v. Mississippi, 421 U.S. 213, 95 S.Ct. 1591, 44 L.Ed.2d 121 (1975).

The Supreme Court has held that the phrase "any law providing for equal civil rights" must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Georgia v. Rachel, 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed.2d 925 (1966). "Thus, removal has been held improper in a variety of cases involving alleged infringements of fundamental federal rights" on the grounds that these rights are not stated in terms of racial equality. Bar Association of Baltimore City v. Posner, 391 F.Supp. 76, 79 (D.Md.1975).

To show that he is being denied or cannot enforce his equal rights in the courts of Arkansas, Wilson must show either

> that there is a basis for a firm prediction that such rights [of racial equality] will be denied in state

> court or that the pendency of the prosecution without more, is a deprivation of such a federally protected right. It is not enough to show that he has a defense with more or less hope of its successful assertion in an impartial tribunal; he must show that his federally secured right of racial equality is denied by the pendency of the proceeding or "by reasons of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by . . . bringing the defendant to trial in the state court."

State of South Carolina v. Moore, 447 F.2d 1067, 1070 (4th Cir.1971). See also Greenwood v. Peacock, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966). Allegations that an individual is being denied equal protection by discriminatory prosecution of professional misconduct and assorted allegations of denial of due process have been held insufficient to support removal under this section. Bar Association of Baltimore City v. Posner, 391 F.Supp. 76, 79 (D.Md.1975).

Wilson contends his removal petition raises the following issues: (1) denial of due process; (2) denial of equal protection; (3) violation of his citizenship rights under Section 2 of the Voting Rights Act of 1965, as amended, and the Thirteenth Amendment of the United States Constitution; (4) violation of federally established rights under 42 U.S.C. § 1981, 42 U.S.C. § 1983, and 42 U.S.C. § 1985; (5) violation of the doctrine of equitable estoppel/ double jeopardy; and (6) violation of his constitutional rights of the United States Constitution insomuch as the rules,

procedures, and laws under which petitioner was being prosecuted were violative of the United States Constitution. Wilson's Brief of July 17, 1995, at 7. Wilson takes the position that the Arkansas Supreme Court's action in appointing a special chancellor to the Phillips Circuit Court to preside over Neal v. Wilson violated the federal Voting Rights Act and the Thirteenth Amendment to the United States Constitution.

Wilson's allegations regarding the denial of constitutional rights generally are clearly insufficient to support removal under § 1443. Johnson v. Mississippi, 421 U.S. 213, 219, 95 S.Ct. 1591, 1595, 44 L.Ed.2d 121 (1975) (Claims that an action "will violate rights under constitutional or statutory provisions of general applicability or under statutes not protecting against racial discrimination, will not suffice."); Doe v. Berry, 967 F.2d 1255, 1257 (8th Cir.1992) (42 U.S.C. § 1983 and 42 U.S.C. § 1985(3) do not meet the test and cannot support removal under § 1443), cert. denied, 507 U.S. 911, 113 S.Ct. 1258, 122 L.Ed.2d 656 (1993). However, courts have held that certain of the statutes relied upon by Wilson qualify as laws providing for "equal civil rights." For instance, the Voting Rights Act confers rights specifically in terms of racial equality and has been held to support removal under § 1443. See e.g., Smith v. Winter, 717 F.2d 191 (5th Cir.1983); Jackson v. Riddell, 476 F.Supp. 849 (N.D.Miss.1979). Additionally, § 1981 qualifies under the statutory definition. Greenwood v. Peacock, 384 U.S. 808, 825, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966).

Assuming for the sake of argument that he has sufficiently asserted a cause of action under a statute securing

racial equality, which the court does not believe he has, Wilson still has not alleged facts which indicate he would be unable to adequately exercise or enforce his rights under these statutes in state court. See Bar Association of Baltimore City v. Posner, 391 F.Supp. 76, 83 (D.Md.1975). As the Supreme Court has stated, to show that he is being denied or cannot enforce the specified federal rights in the courts of the state, Wilson must normally show "that the 'denial be manifest in a formal expression of state law,' . . . such as a state legislative or constitutional provision, 'rather than a denial first made manifest at the trial of the case.' " Johnson, 421 U.S. at 219, 95 S.Ct. at 1595 (citations omitted). Clearly, Wilson has failed to make the required showing, so removal is not supported by the provisions of § 1443.

Additionally for the reasons stated below, we believe the removal was untimely. Section 1446 sets forth the procedures to be used for removal of actions from state to federal court. Section 1446(b) contains two separate time limitations with respect to the removal of civil cases. First, if the initial pleading states a basis for federal jurisdiction, a notice of removal "shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. . . ." 28 U.S.C. § 1446(b). Second, if the case stated in the initial pleading was not removable, "a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. . . ." Id.

Appendix D

The state court disbarment proceeding was filed on October 9, 1991. The action was removed on June 13, 1995. Clearly removal was untimely unless the second thirty day period set forth in § 1446(b) is applicable. Wilson argues that it is. Wilson asserts that this action first became removable when the Arkansas Supreme Court issued the "administrative order . . . affirming its appointment of the Honorable Judge John Lineberger as Special Judge in the cause of Neal v. Wilson, Phillips County Circuit No. CIV-91-147. . . ." Wilson's Brief of August 25, 1995, at 1-2. In essence, Wilson argues the Arkansas Supreme Court's ruling constitutes "other paper" which converts the action into a removable action.

Generally, a non-removable action may only be converted into a removable action by "paper" resulting from some voluntary act of the plaintiff. S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 494 (5th Cir.1996); Gaitor v. Peninsular & Occidental S.S. Co., 287 F.2d 252, 254 (5th Cir.1961) ("other paper" requires a voluntary act of the plaintiff); Horton v. Scripto-Tokai Corp., 878 F.Supp. 902 (plaintiff must do something voluntarily to change the nature of the case and render it removable). It is a well established doctrine that a case may not be heard in district court when the only federal question posed is raised by a defense argument. Caterpillar Inc. v. Williams, 482 U.S. 386, 393, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318 (1987).

The per curiam order of the Supreme Court of Arkansas issued on June 12, 1995, in response to James Neal's petition for writ of certiorari did not convert the otherwise unremovable case into a removable one. The opinion merely reaffirmed the validity of the court's appointment of a special circuit judge to hear the disbarment proceedings.

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Judge Lineberger was appointed by the Arkansas Supreme Court to hear the case on May 3, 1994. The order assigning Judge Lineberger was for some reason not filed in the Phillips County case, Neal v. Wilson, until September 14, 1994. Judge Neal was elected on November 3, 1992, and assumed office shortly thereafter. Thus if any impropriety giving rise to a violation of the Voting Rights Act, or any other statute relied on by Wilson, occurred in connection with the appointment of Judge Lineberger, it occurred on May 3, 1994, or at the latest when the order of assignment was filed in Phillips County. It was the act of appointment not the issuance of the opinion on June 12, 1995, which allegedly violated Wilson's rights and purportedly made the disbarment action removable.

Wilson was well aware of the appointment of Judge Lineberger and in fact asked him to recuse. When Judge Lineberger refused, Wilson did not raise the issue with the Supreme Court but instead later asked Judge Neal to exercise jurisdiction over the case despite the fact that the Arkansas Supreme Court had assigned the case to another judge. The Arkansas Supreme Court then in ruling on the writ of certiorari declared Judge Neal's assumption of jurisdiction to be void because of their earlier appointment. This action did not begin the running of the thirty day period for removal. The removal was therefore untimely. An order will be entered remanding the disbarment action to the Phillips County Circuit Court.[7]

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7. The clerk will also be directed to refund to Wilson the $500 cost bond. Since 1988 the removing party has not been required to post a cost bond.

However, this decision does not end the case. As the court and the parties have recognized, the allegations of the combined petition for removal/complaint at law really encompassed two separate legal actions, the first action being the state court disbarment action which was removed. The second action consists of a federal cause of action for declaratory and injunctive relief based on the alleged constitutional violations. These allegations were presented in the form of a counterclaim and third party complaint. We will proceed to analyze the parties arguments concerning whether this court can legitimately proceed to deciding the merits of the action for declaratory and injunctive relief.

Younger v. Harris Abstention.

The State takes the position, inter alia, that the court must abstain from exercising jurisdiction over the allegations of the counterclaim/third party complaint under the doctrine set forth in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

In Younger v. Harris the Supreme Court "instructed federal courts that the principles of equity, comity and federalism in certain circumstances counsel abstention in deference to ongoing state proceedings." Fieger v. Thomas, 74 F.3d 740, 743 (6th Cir.1996). In the case of Middlesex Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982), a case that appears to be directly on point, the Supreme Court addressed the applicability of this doctrine to pending state disciplinary proceedings. The Court noted that Younger and "its progeny espouse a strong federal policy against federal-court

interference with pending state judicial proceedings absent extraordinary circumstances." Middlesex, 457 U.S. at 431, 102 S.Ct. at 2521. If Younger abstention applies it is not appropriate to address the merits. Greening v. Moran, 953 F.2d 301, 304 (7th Cir.1992), cert. denied, 506 U.S. 824, 113 S.Ct. 77, 121 L.Ed.2d 42 (1992). "To say that abstention is in order then is to say that federal courts should not address the merits, period. Silence by the federal court is the objective of abstention; the desirability of silence is the reason for abstention." Greening, 953 F.2d at 304.

In Middlesex, a New Jersey attorney, Lennox Hinds, was being charged in a disciplinary proceeding with violating two sections of the Disciplinary Rules of the Code of Professional Responsibility as a result of statements he made during a press conference which were critical of an ongoing criminal trial and the trial judge's judicial temperament and racial insensitivity. Middlesex, 457 U.S. at 428, 102 S.Ct. at 2519. Instead of replying to the charges of the Ethics Committee, Hinds filed a suit in federal district court contending the disciplinary rules violated his First Amendment rights. Additionally, he asserted that the rules were facially vague and overbroad. Middlesex, 457 U.S. at 429, 102 S.Ct. at 2519-20.

In analyzing the applicability of Younger the Court applied the following threefold analysis: "first, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise

constitutional challenges." Middlesex, 457 U.S. at 432, 102 S.Ct. at 2521. The Court answered each question affirmatively.

First, the court found the that under New Jersey law the disciplinary proceedings were judicial in nature. As the proceedings were judicial, the Court noted "the proceedings are of a character to warrant federal-court deference." Id., 457 U.S. at 434, 102 S.Ct. at 2522. Second, the Court noted that the State of New Jersey "has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses." Id. "The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice." Id. It also noted that the State's interest in the present litigation was demonstrated by the fact that the Ethics Committee, an agency of the New Jersey Supreme Court, was named as a defendant. Id.

Finally, it noted that Hinds had failed to even attempt to raise any federal constitutional challenges in the state proceedings. Id., 457 U.S. at 435, 102 S.Ct. at 2522-23. Because Hinds has an " 'opportunity to raise and have decided by a competent state tribunal the federal issues involved' . . . and because no bad faith, harassment, or other exceptional circumstances dictate to the contrary, federal courts should abstain from interfering with the ongoing proceedings." Id., 457 U.S. at 437, 102 S.Ct. at 2524. See also Fieger v. Thomas, 74 F.3d 740 (6th Cir.1996) (federal district court should abstain from deciding constitutional challenge to state disciplinary rules where state

disciplinary proceedings are ongoing); Hirsh v. Justices of the California Supreme Court, 67 F.3d 708 (9th Cir.1995) (abstention proper when a federal court complaint alleged the disciplinary system deprived attorneys of various constitutional rights, including due process, equal protection, the right to vote, and the right to court access).

The Arkansas Supreme Court has exclusive jurisdiction over the conduct of Arkansas attorneys and has the power to make "rules regulating the practice of law and the professional conduct of attorneys of law." Ark. Const. Amend. No. 28; Dodrill v. Executive Director, Committee on Professional Conduct, 308 Ark. 301, 824 S.W.2d 383 (1992); Sexton v. Arkansas Supreme Court Comm. on Professional Conduct, 299 Ark. 439, 774 S.W.2d 114 (1989), cert. denied, 494 U.S. 1066, 110 S.Ct. 1782, 108 L.Ed.2d 784 (1990). "Amendment 28 certainly put to rest for all time any possible question about the power of the courts to regulate the practice of law in the state. There can be no doubt that the power of the judicial department, acting through this court, is, in this respect, exclusive and supreme under this amendment, if the power was not already inherent in the courts." McKenzie v. Burris, 255 Ark. 330, 340, 500 S.W.2d 357 (1973).

"The Rules of Professional conduct are the substantive rules governing the bar." Sexton v. Supreme Court Comm. on Professional Conduct, 297 Ark. 154A, 154B, 761 S.W.2d 602 (1988). The Arkansas Supreme Court Committee on Professional Conduct acts as an arm of the Supreme Court in matters relating to the supervision and licensing of Arkansas attorneys. However, the Committee does not

exercise judicial power; rather the Committee's function "is in the nature of an administrative agency, which is not bound by the rules of the courts." Sexton v. Arkansas Supreme Court Comm. on Professional Conduct, 299 Ark. 439, 446, 774 S.W.2d 114 (1989), cert. denied, 494 U.S. 1066, 110 S.Ct. 1782, 108 L.Ed.2d 784 (1990). The Committee on Professional Conduct enforces the substantive rules. Sexton, 297 Ark. at 154B, 761 S.W.2d 602.

The rules governing the action of the Committee and setting forth its procedures provides that, in the event a majority of the committee votes for disbarment, an action for disbarment will be filed with the Clerk of the Circuit Court of the county in which the attorney resides, or in which the alleged violation was committed. Procedures of the Court Regulating Professional Conduct of Attorneys at Law § 5(E)(5) & § 5(G). The action proceeds as an action between the Executive Director and the attorney. Id. § 5(G)(1). The proceedings are to be held in compliance with the Arkansas Rules of Civil Procedure. Id. If the Circuit Judge finds a violation of the ethical rules he may caution, reprimand, suspend or disbar the attorney. Id. at § 5(G)(2). If the attorney does not agree with the decision, he may appeal to the Arkansas Supreme Court. Id. at § 5(H). The appeal is heard de novo. Id. at § 5(H)(3).

We conclude application of the Middlesex threefold test requires abstention in this case. First, the disbarment proceeding is clearly judicial in nature. New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 371, 109 S.Ct. 2506, 2520, 105 L.Ed.2d 298 (1989); Middlesex, 457 U.S. at 433, 102 S.Ct. at 2522. See also

Fieger, 74 F.3d at 744 (Even if state disciplinary procedures were characterized as administrative, abstention would be appropriate under Ohio Civil Rights Comm'n v. Dayton Christian Sch., 477 U.S. 619, 627, 106 S.Ct. 2718, 2722, 91 L.Ed.2d 512 (1986).); Hirsh, 67 F.3d at 712; Greening, 953 F.2d at 304. Second, it cannot be disputed that the state has a strong interest in maintaining and assuring the professional conduct of the attorneys it licenses. "The fact that [Wilson] poses a constitutional challenge to the substance of the rules of professional conduct as well as the procedures adopted to enforce them does not overcome [Arkansas's] interest." Fieger, 74 F.3d at 744.

Finally, Wilson's constitutional challenges can be determined in the state court proceedings. "Minimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights." Middlesex, 457 U.S. at 431, 102 S.Ct. at 2521. In fact, the Supreme Court has held abstention to be appropriate "unless state law clearly bars the interposition of the constitutional claims." Moore v. Sims, 442 U.S. 415, 425-26, 99 S.Ct. 2371, 2379, 60 L.Ed.2d 994 (1979).

The Arkansas Supreme Court has heard and ruled on constitutional challenges presented by attorneys during disciplinary hearings. See e.g., Arens v. Committee on Professional Conduct of the Supreme Court of Arkansas, 307 Ark. 308, 820 S.W.2d 263 (1991) (Fifth and Fourteenth Amendments to the United States Constitution); Sexton v. Arkansas Supreme Court Comm. on Professional Conduct, 299 Ark. 439, 774 S.W.2d 114 (1989) (procedural due process), cert. denied, 494 U.S. 1066, 110 S.Ct. 1782, 108

L.Ed.2d 784 (1990); Eaton & Benton v. Supreme Court of Arkansas Comm. on Professional Conduct, 270 Ark. 573, 607 S.W.2d 55 (1980) (regulations on legal advertising did not violate the First Amendment), cert. denied, 450 U.S. 966, 101 S.Ct. 1483, 67 L.Ed.2d 615 (1981).

Wilson strenuously argues that Younger is inapplicable because the state officials are proceeding with the disciplinary proceedings in bad faith. See e.g., Bishop v. State Bar of Texas, 736 F.2d 292 (5th Cir.1984) (claim that state bar prosecuted disciplinary proceedings against an attorney for many years was sufficient to state a claim that the disciplinary proceedings were taken in bad faith and for an improper motive). According to Wilson "[b]ad faith and the denial of due process can clearly be imputed to the respondents from the facts of this case." Wilson's Brief of July 17, 1995 at 11.

In support, Wilson asks the court to consider the following facts: (1) the disciplinary action was commenced approximately a decade after the sanctionable conduct was committed; (2) there have been two trials in this case; (3) although the Committee prevailed in the second trial they objected to the particular judge presiding in the case and appealed via a writ of certiorari; (4) Wilson's request to do discovery to substantiate his claim of selective prosecution was denied by the judge appointed by the Supreme Court; (5) a special judge was appointed despite the fact that a regularly elected circuit judge had not recused or otherwise disqualified himself from the case; (6) the appointment of a special judge was in violation of Arkansas law and an improper incursion on the jurisdiction of the regularly elected

circuit judge; (7) Wilson's political and social activist activities have incurred considerable ire from persons closely connected with the Committee; (8) the Committee asked for and received a ruling eliminating the statute of limitations in this case; (9) all rules regulating the issuance of writs of certiorari were bypassed for the Committee; (10) the action was commenced while Wilson was in prison and did not have the opportunity to defend himself; (11) absolute disbarment was requested when lesser sanctions are available; (12) the fact that the Committee took an appeal from a favorable decision; and (13) the open hostility of the State toward Wilson as exhibited by its action, language and conduct in the court. Id. at 11-13. See also Wilson Brief of August 25, 1995, at 27-30.

Wilson also contends that this case is a reincarnation of the case of Lewellen v. Raff, 843 F.2d 1103 (8th Cir.1988). Wilson argues the same environment that gave rise to Lewellen has resurfaced to give rise to the instant case. According to Wilson, "[t]here is absolutely no reason but bad faith, harassment, vindictiveness, and racial animosity that would prompt the Supreme Court Committee on Professional Conduct to appeal a decision that was favorable to the Committee and subject Wilson to a third trial on disbarment." Wilson Brief of July 17, 1995, at 17. In Wilson's view, the State's problem with the decision is quite simple; The decision "was not harsh enough and it was rendered by a black judge to a black defendant." Id. See also Wilson Brief of August 25, 1995, at 27-28 (extraordinary act in disregard for the constitutional authority of Judge Neal, extraordinary use of administrative authority of the court to usurp the authority of a duly elected judge, and the resulting denial of the right to franchise).

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In Lewellen the Eighth Circuit was reviewing the decision of a district court to preliminarily enjoin the prosecution of a state criminal trial. The court noted that "[t]he allegations in Lewellen's complaint painted a picture of pervasive racism and discriminatory treatment of blacks in the Lee County court system." Lewellen, 843 F.2d at 1110. The evidence also described an environment in which Lewellen would not be assured adequate vindication of due process and equal protection. Id. at 1111.

The Eighth Circuit in reviewing the district court's findings under the clearly erroneous standard upheld the injunction under the bad faith and harassment exception to the Younger abstention doctrine. Id. at 1112-113.

Nothing presented to this court indicates that the environment present in Lewellen is present in this case. The initiation of disbarment proceeding was in response to Wilson's pleading guilty to criminal conduct involving dishonesty, to say the least. The Committee's seeking of a writ from the Arkansas Supreme Court was in response to a legitimate concern and does not constitute evidence of bad faith. Judge Lineberger had been appointed to preside over the case by the Arkansas Supreme Court and in fact had been exercising that jurisdiction. Judge Neal at the behest of Wilson attempted to wrest jurisdiction over the case from Judge Lineberger by jumping into the fray and hearing the case on the merits prior to Judge Lineberger issuing a decision on the merits. He obviously knew that the case had been assigned by the state's highest court to Judge Lineberger and that it was set to be heard in June.

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We have already discussed in great detail the factual background of this case and will not repeat that discussion here. As our discussion of the facts and history of the present controversy indicates, Wilson's characterization of the events is simply inaccurate or tendentious. The record before us is extensive. We simply find no evidence of "bad faith, harassment, or some other circumstances that would make abstention inappropriate." Middlesex, 457 U.S. at 435, 102 S.Ct. at 2523. See also Fieger, 74 F.3d at 750. Other than the bare assertions of Wilson, there is no evidence that any of the decisions made by the members of the ethics committee or the judges of the Arkansas Supreme Court were motivated by bad faith, racial discrimination, or intent to harass. His contentions in this respect boil down to little more than a belief by him that, since the state actors disagree with him and his lawyers, they must have racially discriminatory motives. That simply doesn't follow.

Quite simply, the allegations are insufficient to establish the extraordinary circumstances under which Younger abstention is inappropriate. See e.g., Hirsh, 67 F.3d at 713-14; Berger v. Cuyahoga County Bar Ass'n, 983 F.2d 718, 724 (6th Cir.1993), cert. denied, 508 U.S. 940, 113 S.Ct. 2416, 124 L.Ed.2d 639 (1993). We believe the case before us falls squarely within the abstention doctrine set forth in Younger v. Harris and applied by the Supreme Court to constitutional challenges to pending state disciplinary proceedings in Middlesex. Therefore, the allegations of the counterclaim/third party complaint will be dismissed by a separate order entered concurrently herewith. Trainor v. Hernandez, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977).

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To the extent Wilson's arguments regarding the appointment of a special judge by the Arkansas Supreme Court can be read to assert claims unrelated to the disbarment proceeding, we will address the parties' arguments regarding the court's jurisdiction to review the decision of the Arkansas Supreme Court.

Rooker-Feldman Doctrine.

Alternatively, the State takes the position that the court must dismiss the allegations of the counterclaim/third party complaint under the Rooker-Feldman doctrine.[8] We believe that if this doctrine has any applicability it is only to the decision of the Arkansas Supreme Court regarding the appointment of Judge Lineberger to the Phillips County case.

The Court of Appeals for the Eighth Circuit recently examined this doctrine and summarized it in the following terms:

> The Rooker-Feldman doctrine states that district courts do not have subject matter jurisdiction over challenges to state court decisions in judicial proceedings. Rooker v. Fidelity Trust Co., 263 U.S. 413, 416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 103 S.Ct. 1303, 1311, 75 L.Ed.2d 206 (1983). The only court with jurisdiction to review decisions of state courts is the United States Supreme Court. A federal

8. See also 28 U.S.C. § 1738.

> district court has jurisdiction over general constitutional challenges if these claims are not inextricably intertwined with the claims asserted in state court. A claim is inextricably intertwined if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. In other words, Rooker-Feldman precludes a federal action if the relief requested in the federal action would effectively reverse the state court decision or void its ruling.

Charchenko v. City of Stillwater, 47 F.3d 981, 983 (8th Cir.1995) (citations omitted). See also LaNave v. Minnesota Supreme Court, 915 F.2d 386, 388 (8th Cir.1990), cert. denied, 500 U.S. 923, 111 S.Ct. 2028, 114 L.Ed.2d 113 (1991). The doctrine "is broader than claim and issue preclusion because it does not depend on a final judgment on the merits." Charchenko, 47 F.3d at 983 n. 1.

Wilson argues the Rooker-Feldman doctrine is inapplicable on the grounds that the act of the Arkansas Supreme Court in granting the writ of certiorari and voiding Judge Neal's ruling was administrative rather than judicial. We reject this argument. Perhaps the act of appointing a special judge in the first instance can be regarded as administrative rather than judicial; however, the act of declaring the decision of one judge to be void on the grounds that a different judge was given authority over the case is clearly judicial in nature. Thus, the application of the Rooker-Feldman doctrine precludes review.

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Conclusion.

It makes no difference to this court whether Mr. Wilson is ultimately disbarred — it is simply none of this federal court's business. However, the simple fact is that this court has no removal jurisdiction of this case and never did, and didn't during any of the 9 month period when the pendency of this matter in this court served to stall the proceedings. This court is convinced that it is in the interest of all parties and in the public interest for this matter which has been going on in one form or another for well over a decade, to come to a conclusion one way or the other.

For the reasons stated above, the disbarment action will be remanded to the Circuit Court of Phillips County, Arkansas. Additionally, the court will abstain from deciding the issues raised in the counterclaim/third party complaint and that portion of the case will be dismissed. A separate order in accordance herewith will be concurrently entered.

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ORDER OF REMAND & JUDGMENT

On this 14th day of March, 1996, the court finds for the reasons stated in a memorandum opinion of even date as follows:

(1) The case of Neal v. Wilson, Civ. No. 91-147 which was removed to this court on June 13, 1995, was improvidently removed and should be and hereby is remanded to the Circuit Court of Phillips County, Arkansas. The clerk of this court is directed to send a certified copy of this order to the clerk of the state court. The clerk is also directed to refund to Jimmie L. Wilson the cost bond in the amount of $500 which was deposited at the time of removal.

(2) The court will abstain from deciding the issues raised in the federal court action for declaratory and injunctive relief (referred to as the counterclaim/third party complaint) and this portion of the case is dismissed. Alternatively, the court holds that application of the Rooker-Feldman doctrine precludes review.

IT IS SO ORDERED.

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND DECIDED APRIL 25, 1997

United States Court of Appeals,
Eighth Circuit.

JAMES A. NEAL, Director of Arkansas Supreme Court Committee on Professional Conduct,

Plaintiff/Appellee,

v.

JIMMIE L. WILSON,

Defendant/Appellant,

v.

JACK HOLT, JR., Member of the Supreme Court of the State of Arkansas; Robert H. Dudley, Member of the Supreme Court of the State of Arkansas; Tom Glaze, Member of the Supreme Court of the State of Arkansas; Donald Corbin, Member of the Supreme Curt of the State of Arkansas; John Lineberger, Chancery Judge of the Fourth Judicial District of Arkansas; Members of Arkansas Supreme Court Committee on Professional Conduct; Robert Donovan, Attorney for the Arkansas Supreme Court Committee on Professional Conduct; John Doe, Defendants and other unknown John Doe Defendants, known and unknown, each individually and in his official capacity as set out herein; Ken Reeves, Chairman; Sue Winter, Secretary; Carlton Bailey, Member of the Arkansas Supreme Court Committee

on Professional Conduct; Allen Humphries, Member of the Arkansas Supreme Court Committee on Professional Conduct; Richard A. Reed, Member of the Arkansas Supreme Court Committee on Professional Conduct; Burt Virden, Member of the Arkansas Supreme Court Committee on Professional Conduct; Patricia Youngdahl, Member of the Arkansas Supreme Court Committee on Professional Conduct,

Third Party Defendants/Appellees.

No. 96-2112.

Submitted Jan. 15, 1997.
Decided April 25, 1997.

* * *

Before WOLLMAN and FLOYD R. GIBSON, Circuit Judges, and MONTGOMERY,[1] District Judge.

WOLLMAN, Circuit Judge.

Jimmie Wilson appeals from the district court's[2] order remanding his disbarment case to state court and dismissing a complaint Wilson filed against various Arkansas officials. We affirm.

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1. The HONORABLE ANN D. MONTGOMERY, United States District Judge for the District of Minnesota, sitting by designation.

2. The Honorable H. Franklin Waters, United States District Judge for the Western District of Arkansas, sitting by designation.

Appendix E

I. Background

The background of this case stretches back almost seventeen years and involves numerous proceedings in state and federal court. Wilson, an African-American from Helena, Arkansas, has been a lawyer, farmer, civil rights activist, and state legislator. Wilson borrowed money for his farm from the Farmers Home Administration between 1980 and 1982, securing the loan with a lien on his crops. Wilson attempted to avoid the government lien and was convicted in 1985 of knowingly disposing of property mortgaged to a government agency, unlawfully converting money of the United States, and conspiring to defraud the United States. See United States v. Wilson, 806 F.2d 171 (8th Cir.1986). His conviction was ultimately reversed in 1989 because of a Batson violation at his trial. See United States v. Wilson, 884 F.2d 1121 (8th Cir.1989) (en banc). Wilson subsequently pleaded guilty in 1990 to five misdemeanor counts of converting property mortgaged or pledged to a farm credit agency and converting public money to personal use and was sentenced to imprisonment and probation.

Because of his conviction, Wilson was suspended from practice by the United States District Court for the Eastern District of Arkansas in January of 1991, pending the outcome of any disciplinary proceedings. The court referred the matter to the Arkansas bar authorities, specifically James Neal, the executive director of the Arkansas Supreme Court Committee on Professional Conduct (the Committee). The Committee decided that Wilson's conduct warranted disbarment. After Wilson refused to voluntarily surrender his license, the Committee filed a complaint for disbarment in the Phillips

County Circuit Court. All of the circuit judges in that circuit recused themselves, and the Chief Justice of the Arkansas Supreme Court assigned a circuit judge from another circuit to hear the case. This circuit judge dismissed the complaint in 1993 on the ground it was time-barred, a ruling that was reversed by the Arkansas Supreme Court. See Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994) (Wilson I).

The crux of Wilson's federal case stems from what happened when the case was remanded by the Arkansas Supreme Court to the Phillips County Circuit Court. The appointed circuit judge recused himself because of his disagreement with the supreme court's opinion. The supreme court subsequently appointed another outside circuit judge, John Lineberger, to hear the case in 1994. Wilson moved for Judge Lineberger's disqualification on the basis that there was a new circuit judge in Phillips County who had not recused himself who should hear the case. That judge was Olly Neal, an African-American, who had been elected in 1992 in a minority-majority district, newly created pursuant to a consent decree in a Voting Rights Act lawsuit. Neal was Wilson's former law partner and one of the attorneys who had represented Wilson in his criminal case. Neal also testified at Wilson's federal trial.

Judge Lineberger denied the disqualification motion on January 5, 1995, and set a trial date of June 13, 1995. At Wilson's instigation, a hearing was set before Judge Neal. Following the hearing, Judge Neal ruled on May 24, 1995, that he had jurisdiction. He then decided the merits of the case, concluding that Wilson's conduct warranted only a letter of reprimand. The Committee sought a writ of certiorari

from the Arkansas Supreme Court. The supreme court issued the writ on June 12, 1995, ruling that Judge Neal did not have jurisdiction and quashing Judge Neal's orders. See Neal v. Wilson, 321 Ark. 70, 900 S.W.2d 177 (1995) (per curiam) (Wilson II).

On June 13, 1995, before Wilson's trial began, he removed the case from Judge Lineberger's court to the district court, citing 28 U.S.C. § 1443(1) as the basis for removal. Wilson filed a counterclaim and third-party complaint against numerous state officials, including Neal, the members of the Committee, the justices of the Arkansas Supreme Court who formed the majority in Wilson II, Judge Lineberger, and John Doe defendants. Wilson alleged violations of his federal constitutional and statutory rights and sought declaratory and injunctive relief. See Neal v. Wilson, 920 F.Supp. 976, 982-83 (E.D.Ark.1996) (Wilson III).

The case was assigned to United States District Judge George Howard, Jr. After briefing, Judge Howard recused himself because of the district court's initial reference of Wilson to the state bar authorities for disciplinary action in 1991 and directed that the case be assigned to a judge from outside the Eastern District of Arkansas. Judge Waters was subsequently assigned the case.

The district court first concluded that Wilson's attempted removal of his disbarment case was improper. Even assuming that Wilson had pleaded causes of action under 42 U.S.C. § 1981 or the Voting Rights Act, the court concluded that Wilson had not met the requirements for section 1443(1) removal because he had failed to show that he would be

unable to adequately enforce his rights in state court. The court also concluded that the removal was untimely and remanded the case to state court. See Wilson III, 920 F.Supp. at 983-86. With regard to the merits of Wilson's complaint, the district court concluded that it should abstain under the Younger abstention doctrine. It also concluded that the Rooker-Feldman doctrine precluded what would be essentially federal court review of the Arkansas Supreme Court's decision regarding Judge Lineberger's appointment. The court then dismissed Wilson's complaint. See id. at 986-91. Wilson subsequently moved for reconsideration and requested that Judge Waters recuse himself for the same reason given by Judge Howard. The district court denied both motions.

On appeal, Wilson argues that he met the requirements of section 1443 for removal, that his petition for removal was timely, that the district court erred in abstaining, that the district court erred applying the Rooker-Feldman doctrine, and that Judge Waters erred in refusing to recuse himself.

II. Discussion

A. Removal/Remand

We may review the district court's remand order because this case involves a section 1443 removal. See 28 U.S.C. § 1447(d); Doe v. Berry, 967 F.2d 1255, 1257 (8th Cir.1992) (per curiam). We conclude that the district court properly remanded Wilson's case to the state courts because Wilson's notice of removal was untimely; alternatively, the district

court correctly concluded that Wilson did not meet the requirements for removal under section 1443(1).

Wilson admits that he was required to file his notice of removal "within thirty days after receipt . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is . . . or has become removable." 28 U.S.C. § 1446(b). Wilson argues that the relevant "order or other paper" was the Arkansas Supreme Court's June 12, 1995, opinion in Wilson II affirming Judge Lineberger's appointment and quashing Judge Neal's orders. We disagree. As the district court stated, the Arkansas Supreme Court's opinion in Wilson II affirming the validity of its own prior action did not convert an otherwise unremovable case into a removable one. See Wilson III, 920 F.Supp. at 986. The thrust of Wilson's complaint is that his rights were violated when the Arkansas Supreme Court appointed Judge Lineberger to hear his case. The Arkansas Supreme Court made this appointment in May of 1994, and Wilson did not file his notice of removal within thirty days of his receipt of this order. Even reading the record in the light most favorable to Wilson, the thirty-day limitation period began running no later than January 5, 1995, the day on which Judge Lineberger overruled Wilson's motion for disqualification in which Wilson raised his argument that Judge Neal had jurisdiction over the case. Wilson's June 13, 1995, notice of removal was thus untimely by a factor of months.

Even assuming that Wilson's removal notice was timely, the district court correctly ruled Wilson had not established his eligibility for a section 1443(1) removal. Under that

statute, Wilson must show that he relies upon a law providing for equal civil rights stated in terms of racial equality. See 28 U.S.C. § 1443(1); Georgia v. Rachel, 384 U.S. 780, 792, 86 S.Ct. 1783, 1790, 16 L.Ed.2d 925 (1966). Although we doubt that Wilson has done so, we will assume, as did the district court, that Wilson has sufficiently asserted causes of action under the Voting Rights Act and 42 U.S.C. § 1981. See City of Greenwood v. Peacock, 384 U.S. 808, 825, 86 S.Ct. 1800, 1811, 16 L.Ed.2d 944 (1966) (Voting Rights Act and § 1981 fall within statutory definition of § 1443(1)). Wilson must show that he is denied or cannot enforce that right in state court. See 28 U.S.C. § 1443(1). "Removal is warranted only if it can be predicted by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts." Rachel, 384 U.S. at 800, 86 S.Ct. at 1796. Further, in "the unusual case . . . 'an equivalent basis could be shown for an equally firm prediction that the defendant would be "denied or cannot enforce" the specified federal rights in the state court.' " See Johnson v. Mississippi, 421 U.S. 213, 219, 95 S.Ct. 1591, 1595, 44 L.Ed.2d 121 (1975) (quoting Rachel, 384 U.S. at 804, 86 S.Ct. at 1796).

Wilson has not met these stringent requirements. He has not shown that there is a state law preventing him from raising his federal claims in state court, nor has he shown the basis for an "equally firm prediction" that he will be unable to protect his federal rights in state court. As the district court stated, Wilson's contentions regarding the defendants "boil down to little more than a belief by him that, since the state actors disagree with him and his lawyers, they must have racially discriminatory motives." Wilson III,

920 F.Supp. at 990. If, as Wilson fears, the Arkansas state courts do not respect and enforce his federal rights, Wilson's proper course of action is to seek direct review in the United States Supreme Court. See Berry, 967 F.2d at 1258 ("The issues involved . . . can be decided in the state courts, which have equal responsibility for ruling on federal constitutional issues. Berry may then seek review of any adverse rulings in the United States Supreme Court.").[3]

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3. Wilson makes assertions regarding the motives and possible bias of the state bar authorities. As the Supreme Court has stated:

> It is not enough to support removal under § 1443(1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial. . . . The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be "denied or cannot enforce in the courts" of the State any right under a federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial. Under § 1443(1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.

City of Greenwood, 384 U.S. at 827-28, 86 S.Ct. at 1812-13.

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B. Wilson's complaint

The district court lacked subject matter jurisdiction to consider the claims Wilson pleaded in his second amended complaint because of the Rooker-Feldman doctrine. We recently summarized the Rooker-Feldman doctrine:

> The Rooker-Feldman doctrine states that district courts do not have subject matter jurisdiction over challenges to state court decisions in judicial proceedings. Rooker v. Fidelity Trust Co., 263 U.S. 413, 416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 103 S.Ct. 1303, 1311, 75 L.Ed.2d 206 (1983). The only court with jurisdiction to review decisions of state courts is the United States Supreme Court. A federal district court has jurisdiction over general constitutional challenges if these claims are not inextricably intertwined with the claims asserted in state court. A claim is inextricably intertwined if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. In other words, Rooker-Feldman precludes a federal action if the relief requested in the federal action would effectively reverse the state court decision or void its ruling.

Charchenko v. City of Stillwater, 47 F.3d 981, 983 (8th Cir.1995) (citations omitted). See also Bechtold v. City of Rosemount, 104 F.3d 1062, 1065-66 (8th Cir.1997).

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Wilson's complaint repetitively recites the facts of the case and alleges that these facts show violations of the Fifth, Fourteenth, and Fifteenth Amendments, the Voting Rights Act,[4] 42 U.S.C. §§ 1981, 1983, 1985, and 1986, and Arkansas state law. As relief, Wilson requested removal of the Phillips County Circuit Court case and the Arkansas Supreme Court case to the federal court "for a determination of the constitutional rights of [Wilson]," an injunction preventing the defendants from further seeking Wilson's disbarment, an order dismissing the disbarment complaint filed against Wilson, and recognition "that the Order of Judge Neal entered in this matter [is] a legal judgment."

Wilson's complaint does not present a general challenge to the constitutionality of the Arkansas procedural rules regarding attorney disbarment. See Feldman, 460 U.S. at 486, 103 S.Ct. at 1316-17 (district courts may entertain general challenges to state bar rules). In our view, the district court could not review Wilson's claims and grant relief without effectively reviewing and reversing the decisions of the Arkansas Supreme Court in Wilson I and Wilson II, particularly its conclusions that the disbarment action was not barred by the statute of limitations and that Judge Lineberger, rather than Judge Neal, had jurisdiction over Wilson's disbarment trial. Thus, the district court lacked jurisdiction under the Rooker-Feldman doctrine to consider Wilson's complaint because his federal claims are inextricably intertwined with his state case.

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4. Wilson's Voting Rights Act claim is based on an alleged violation of the consent decree in Hunt v. Arkansas, No. PB-C-89-406 (E.D.Ark. Sept. 24, 1992).

Alternatively, to the extent that any portion of Wilson's complaint survived the jurisdictional bar of the Rooker-Feldman doctrine, the district court correctly ruled that Younger abstention was warranted under the standard of Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). The only Middlesex element in dispute is whether there is "an adequate opportunity in the state proceedings [for Wilson] to raise constitutional challenges." Id. at 432, 102 S.Ct. at 2521. Wilson has not pointed to any state obstacle preventing him from raising his federal claims in the state proceedings. See Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14, 107 S.Ct. 1519, 1527, 95 L.Ed.2d 1 (1987) (burden on plaintiff to show that state procedural law barred presentation of claims); Hirsh v. Justices of Supreme Court of California, 67 F.3d 708, 713 (9th Cir.1995). The Arkansas Supreme Court has in the past considered constitutional claims presented during attorney disciplinary hearings. See Arens v. Committee on Professional Conduct, 307 Ark. 308, 820 S.W.2d 263 (1991); Sexton v. Arkansas Supreme Court Comm. on Professional Conduct, 299 Ark. 439, 774 S.W.2d 114 (1989); Eaton v. Supreme Court of Arkansas, 270 Ark. 573, 607 S.W.2d 55 (1980). Because Wilson has the opportunity to raise his federal claims in the state proceedings, Younger abstention is appropriate. See Middlesex, 457 U.S. at 432, 102 S.Ct. at 2521; Hirsh, 67 F.3d at 713.

Wilson argues that the state authorities have acted in bad faith by seeking the reversal of two circuit court decisions favorable to Wilson and that the conduct of the state authorities and the Arkansas Supreme Court shows that Wilson's federal rights will not be honored in state court.

See Middlesex, 457 U.S. at 435, 102 S.Ct. at 2523 (bad faith, harassment, or extraordinary circumstances justify exceptions to abstention). We remind Wilson that we may not engage any presumption "that the state courts will not safeguard federal constitutional rights." Id. at 431, 102 S.Ct. at 2521; Hirsh, 67 F.3d at 713 ("one who alleges bias 'must overcome a presumption of honesty and integrity in those serving as adjudicators' ") (quoted cases omitted). We agree with the district court that Wilson has proffered no evidence of bad faith, harassment, or other circumstance that might render abstention inappropriate. The Arkansas Supreme Court reversed the two previous circuit court rulings on state law grounds, and Wilson has the opportunity in the current state proceedings to raise his federal claims. As we noted above, the district court characterized Wilson's contentions of bad faith by the defendants as "little more than a belief by him that, since the state actors disagree with him and his lawyers, they must have racially discriminatory motives." Cf. Peterson v. Sheran, 635 F.2d 1335, 1340 (8th Cir.1980) (disbarred lawyer argued Minnesota Supreme Court biased against him and he would not have "real opportunity" to raise claim before that court; allegations not sufficient because he alleged only general bias because of previous proceedings in case and hypothetical reactions of state judges to his public criticism).[5]

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5. We also agree with the district court that our case of Lewellen v. Raff, 843 F.2d 1103 (8th Cir.1988), is distinguishable from the present case.

C. Recusal

Wilson argues that Judge Waters should have recused himself for the same reason given by Judge Howard. We disagree. Judge Howard recused himself because the District Court for the Eastern District of Arkansas had referred Wilson's disciplinary matter to the Arkansas bar authorities. Because Judge Waters was not involved in that decision, the rationale for Judge Howard's recusal does not apply to him. We presume that Judge Waters is impartial, and Wilson has not met his " 'substantial burden of proving otherwise.' " In re Kansas Pub. Employees Retirement Sys., 85 F.3d 1353, 1358 (8th Cir.1996) (quoted case omitted).[6] Accordingly, Judge Waters did not abuse his discretion in refusing to recuse himself. See id. (citing 28 U.S.C. § 455(a)).

III. Conclusion

Resolution of this matter should take place in the courts of Arkansas, not the federal courts. The judgment is affirmed.

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6. We also disapprove of Wilson's decision to wait until after Judge Waters had issued an unfavorable ruling before moving for recusal.